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JOSEPH DACH

Conversion of Foreign Money

A Comparative Study of Changing Rules

I. Introduction

At first sight, the changes that have occurred in the rules fixing the date for the conversion of an unsatisfied foreign money obligation into domestic currency appear chaotic. Yet the problem of converting foreign money into domestic currency is an ancient one,[1] and one would expect to find well-settled rules of law to regulate the process.

The present study began as an inquiry into the causes of this phenomenon. As a working hypothesis, it was assumed that the rules providing for conversion at the rate prevailing on any specific date (date of maturity, or when suit was commenced, or the day of judgment, etc.) are merely manifestations of a more general rule providing for conversion according to these various rates depending on the trend of foreign money rates: the rate prevailing on the due date in times of appreciation of the domestic money, the rate prevailing on the day of judgment (or day of payment where that is possible) in a period of appreciation of the foreign money. It was believed possible that the *apparent changes* in rules were actually applications of this general principle.

Study of the American cases showed indications that the hypothesis is correct, but the dollar has been so persistently firm in terms of foreign money during the last quarter of a century that the theory could not be tested convincingly by recent American cases.

The changes in the Continental European conversion rules, paralleling the sharp turns in the trends of foreign exchange rates, offered, however, a fruitful field of study. The rules of the European countries here analyzed have been the same as the American rules in at least one respect, namely, that they provided for conversion on a given date[2]: the breach day, or a

Joseph Dach is Director, Finance Division, Italian Technical Delegation; Lecturer in Monetary Law, George Washington University; Member of the D. C. Bar.

[1] Conversion of foreign money into that of the place of payment under Roman law was treated, e.g., in Digesta (D. XLVI. 3.99, Paulus), in the Glossators (Scaccia 2, §102), cited by Bátor, Pénztartozás in Szladits (ed.) 3 Magyar Magánjog, (1941) 240.

[2] Except the present rules of conversion of foreign money in bills of exchange and checks in countries which adopted the Geneva rules. See *infra* p. 177 *et seq.*

subsequent day in the life history of the obligation. The explosive force of monetary changes has compelled the courts to abandon these apparent rules again and again, in accord with a more general underlying rule. It is believed that comparison of these phenomena with the American experience will contribute to understanding of the fundamentally identical rules.

II. Review of Conversion Rules

Besides the United States, the rules of England, Switzerland, France, Belgium, Italy, Germany, Austria, and Hungary, will be summarized. Emphasis will be not so much on what the law now is, but on what changes have taken place. The Swiss experience—with the franc showing the same stability as the dollar—is closest to that of the United States; the Hungarian, reflecting, by 1946, depreciation of money to its one-1,000,000,000,000,000,000,000,000,000,000,000th part,[3] is probably the farthest removed. It is the more remarkable that, despite all the differences between the legal systems in these countries and the diversity of the situations, the *changes* in the conversion rules follow the same pattern.

United States

American law has no restriction on stipulation of foreign money as the money of account of obligations,[4] but it is a well-settled rule that courts cannot render judgment for the payment of any other money than American dollars.[5] It is equally well settled that an agreement, if any, of the parties respecting the method of converting foreign money into dollars is valid.[6] At this point, however, uniformity and certainty end so far as conversion is concerned.

Since World War I, the courts have followed either the "New York

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[3] Bank of International Settlement, 17th Annual Report 28–9 (1946) quoted in 61 Yale L. Journ. (1952) 758.

[4] The only instances that could be found where American courts held foreign currency stipulations invalid were in multiple currency clauses where one alternative money of account was the gold dollar. The Supreme Court of the United States held that since the gold dollar obligation could be discharged dollar for dollar under the Gold Coin Joint Resolution, the alternative foreign money obligations could be discharged by the same number of dollars. In these cases, however, the stipulation for foreign money was disregarded for the very reason that the court did not recognize these debts as true foreign money obligations. For citations and convincing criticism, see Nussbaum, "Multiple Currency and Index Clauses," 84 U. of Pa. L. Rev. (1936) 569.

[5] "The dominant feature of the common law of foreign currency debts is compulsory judicial conversion," Nussbaum, Money in the Law (1950) 364, citing the Monetary Act of 1792, numerous cases, and literature, and giving the history of the rule since the Middle Ages, when the creditor still had a choice between suing for the foreign money or for English money.

[6] *Cf.* Pape v. Home Ins. Co., 139 F.2d 231 (C.C.A. 2d, 1943); Nussbaum, *op. cit.*, 373.

rule" or the "federal rule." According to the former, crystallized by the New York courts,[7] foreign money obligations are converted into dollars at the rate prevailing on the day when the obligation became due, or, when the tort was committed; it is often referred to as the "breach-day rule."[8] The federal rule, so called because enunciated by the Supreme Court of the United States, distinguishes between causes of action arising[9] under domestic law in the United States, in which event—as under the New York rule—the breach-day rule is applied[10], and cases where the obligation was created under foreign law, when the rate prevailing on

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[7] Ladd v. Parkell 40 Super. (8 J. & S.) 150 (1875); Hoppe v. Russo-Asiatic Bank, 235 N.Y. 37, 138 N.E. 497 (1923) affd. 200 App. Div. 460, 193 N.Y. Supp. 250 (1st Dept. 1922); Winter v. American Aniline Products Inc., 204 App. Div. 792, 198 N.Y. Supp. 717 (1st Dept., 1923) rev'd on other grounds, 236 N.Y. 199, 140 N.E. 561 (1923); Sokoloff v. National City Bank, 250 N.Y. 69, 164 N.E. 745 (1928); Orlik v. Wiener Bank Verein, 204 App. Div. 432, 198 N.Y. Supp. 413 (1st Dept. 1923); Richard v. National City Bank, 231 App. Div. 559, 248 N.Y. Supp. 113 (1st Dept. 1931); Gross v. Mendel, 171 App. Div. 237, 157 N.Y. Supp. 357 (1st Dept. 1916) affd. 225 N.Y. 633, 121 N.E. 871 (1918); Kantor v. Aristo Hosiery Co. Inc. 222 App. Div. 502, 226 N.Y. Supp. 630, 162 N.E. 553. (1928); Hampikan v. Mutual Life Ins. Co., 136 Misc. 520, 240 N.Y. Supp. 26 (Sup. Ct. 1930) aff'd 231 App. Div. 817, 246 N.Y. Supp. 887 (1st Dept. 1930); Moser v. Corn 140 Misc. 417, 249 N.Y. Supp. 606, (Sup. Ct. 1931) aff'd 234 App. Div. 842, 254 N.Y. Supp. 922 (1st Dept. 1931); Comptoir Commercial d'Importation v. Zabriskie, 127 Misc. 461, 216 N.Y. Supp. 473 (Sup. Ct. 1926) aff'd 222 App. Div. 732, 225 N.Y. Supp. 808 (1st Dept. 1927); Redo y Cia v. First National Bank, 200 Calif. 161, 252 P. 587 (1926). In Sutherland v. Mayer, 271 U.S. 272, 46 S. Ct. 538, 70 L. Ed. 943 (1926), which came before the Supreme Court shortly before the Die Deutsche Bank case (*infra*, note 11), the breach-day rule was still applied.

[8] The classical formulation of the New York rule was given in Hoppe v. Russo-Asiatic Bank (*supra*, note 7):

"In an action properly brought in the courts of this state by a citizen or alien to recover damages, liquidated or unliquidated, for breach of contract or for tort, where primarily the plaintiff is entitled to recover a sum expressed in foreign money, in determining the amount of the judgment expressed in our currency the rate of exchange prevailing at the date of the breach of contract or at the date of the commission of the tort is *under ordinary circumstances* to be applied." (emphasis added).

The New York Annotations to the Restatement of the Law of Conflict of Laws (1934) make the following comment (at p. 274): "Though the language of the Court of Appeals . . . has indicated that the breach-day rule is not of universal application, *the court has not yet shown in what exceptional situation the rule will be departed from*" (emphasis added). *Cf. infra*, p. 159 *et seq.*

[9] Nussbaum, *op. cit.* 367, note 31, remarks that "it is not clear whether the place of payment or the applicable law is the criterion of the distinction. The langauge suggests the latter, but the former probably conforms more to Mr. Justice Holmes' idea, as appears from *Hicks* v. *Guinness* where he used the breach-day rule on the ground that the debt was payable within the United States."

[10] Hicks v. Guinness, 269 U.S. 71, S. Ct. 46, 70 L. Ed. 168 (1925), followed by Det Forenede Dampskibs Selskab v. Insurance Co. of North America, 31 F.2d 658, affirming D.C. 28 F.2d 449 and cert. denied 50 S. Ct. 28, 280 U.S. 571, 74L. Ed. 623 (1929); The Muskegon 10 F.2d 817 (D.C. N.Y. 1926); Bank of California N.A. v. International Mercantile Marine Co. 40 F.2d 78, reversed, C.C.A. 64 F.2d 97, cert. denied 54 S. Ct. 66, 290 U.S. 649, 78 L. Ed. 563 (1930); Taubenfeld v. Taubenfeld 97 N.Y.S. 2d 158 (N.Y. Sup. 1950).

the day of judgment is applied.[11] At present, the trend is toward the breach-day rule chiefly perhaps because of the limitations imposed on the application of federal rules, if in conflict with state rules, by *Erie Railroad Co.* v. *Tompkins*.[12] The present situation may, therefore, be summed up as follows: foreign money obligations are converted into dollars at the rate of maturity, or of the time when the tort was committed, *except* that, if the obligation arose outside the United States, and federal law is applicable, the rate on the day of judgment will apply.

This was not the settled law of the United States before World War I. As a matter of fact, the established rule was conversion at the rate when suit was brought or when judgment was rendered,[13] and not when the breach or tort was committed.

In a Maryland case[14] in 1809, it was held that plaintiff should recover as much money on a bill of exchange payable in London as would purchase a similar bill *at the time of the verdict*. In 1819, a Pennsylvania court converted Turkish piasters at the rate prevailing *at the time of the trial*, which—the court stated—was *the settled rule*.[15] In 1839, the circuit court of Massachusetts converted the value of the sales price of consigned goods, sold in Trieste, into dollars at the rate of the *day of the verdict*.[16] The rate on the *day of trial* was used by a Pennsylvania court in 1856.[17] In 1866, in a Maryland case[18] where plaintiff was entitled to

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[11] The leading case is Die Deutsche Bank Filale Nurnberg v. Humphrey, 272 U.S. 517, 47 S. Ct. 166, 71 L. Ed. 383 (1926). The opinion speaks about "the moment when suit is brought" but both the dissenting opinion and particularly Indian Refining Co. v. Valvoline, 75 F.2d 797 (1935) and Royal Insurance Co., Ltd. 57 F.2d 288 (1932) show that the day of judgment was meant. The rule was followed in Zimmermann v. Sutherland, 274 U.S. 253, 47 S. Ct. 625, 71 L. Ed. 1034 (1926); Thornton v. National City Bank, 45 F.2d 127 (C.C.A. 2d, 1930); Tillman v. Russo-Asiatic Bank, 51 F.2d 1023 (C.C.A. 2d, 1931) 80 A.L.R. 1368, cert. denied, 285 U.S. 539, 52 S. Ct. 312, 76 L. Ed. 932 (1932); Royal Ins. Co. v. Compania Transatlantica Espanola, 57 F.2d 288 (E.D. N.Y. 1932). Indian Refining Co. v. Valvoline Oil Co. 75 F.2d 797 (1935). As to setoff, *cf.* First Nat. Bank v. Anglo-Oesterreichische Bank, for use of Anglo-Austrian Bank, for use of Grouf, 37 F.2d 564 (C.C.A. Pa. 1930) where setoff at rate on due date was rejected, and rate on day of setoff applied. The Integritas, 3 F. Supp. 891 (D.C. Md. 1933); The Muskegon (see above, note 10); The West Arrow, 10 F. Supp. 385 (1935), modified C.C.A. 80 F.2d 853 (1936); Sun Ins. Office v. Auraca Fund 84 F. Supp. 516 (D.C. Fla. 1949); Bonnell v. Von Schultz, 95 N.Y.S. 2d. 617, 197 Misc. 756 (N.Y. Sup. 1950); Paris v. Central Chiclera, S. de R.L., 193 F.2d 960 (C.A. Texas 1952).

[12] 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

[13] Judgment day, trial day, and day when verdict is rendered are often used as interchangeable terms. See cases cited below, notes 14, 15, 16.

[14] Bryden v. Taylor, 2 Har. & J. 396, 3 Am. Dec. 554 (1809).

[15] Lee v. Wilcocks, 5 Serg. & R. 48. The court stated (at p. 49): "*The settled rule is*, where foreign money is the object of the suit, *to fix the value according to the rate of exchange at the time of trial*." (emphasis added).

[16] Grant v. Healey, Fed. Cas. No. 5696; 3 Sumn. 523; 2 Law Rep. 113 (1839).

[17] Wood v. Kelso, 27 Pa. 241 (1856).

[18] Marburg v. Marburg, 26 Md. 8,90 Am. Dec. 84 (1866).

florins in Frankfort, the court held that plaintiff was entitled to so many dollars as would make it possible to buy the foreign money and remit the same abroad. The rate prevailing on the *day of trial* was used by a Wisconsin court in 1870.[19] The breach-day rule, however, was applied in two federal cases and in a California judgment between 1867 and 1893.[20] In 1894, a Texas judgment[21] came up with the Solomon's solution of converting Mexican money into dollars at the *arithmetic average* between the rates on the due date and the day when suit was brought.[22] In a 1920 decision,[23] the federal district court in New York held that an amount in French francs, payable in France, was to be converted into dollars at a rate yielding as many dollars as would purchase the requisite number of francs on the *day of the decree*.[24]

In cases involving obligations to pay foreign money which arose shortly after the Civil War when the dollar was at a discount, the New York courts either ignored the depreciation of the dollar and converted *at mint par*, or—in at least one instance—they also used the trial date rate.[25] In the cases dealing with Confederate money, if the obligation was enforceable at all, the amount of the obligation was converted into lawful money of the United States according to its value at the time and place where the contract was made.[26] These cases dealt with an exceptional

[19] Hawes v. Woolcock 26 Wisc. 629 (1870).

[20] The Patrick Henry, Fed. Case No. 10,805, 1 Ben. 292 (1867); Forbes v. Murray, Fed. Case No. 4,928, 3 Ben. 497 (1869) Grunwald v. Freese, 34 Pac. 73 (1893).

[21] Butler v. Merchant (Civ. App.) 27 S. W. 193 (1894). At 193:

"There was no error in allowing appellee the value of Mexican money in money of the United States between the time when it became due and the institution of the suit. The value between those dates ranged from 69 cents to 92 cents, and the court allowed for 80 cents on the dollar. At time of the trial it was worth only 66 cents, and appellants contend that this value is all that appellee should recover, but we do not think that appellee (at 194) should be made to lose by the failure of appellant to repay the money he owed at the proper time."

[22] The court, as seen in the quotation above, note 21, did not use the expression "arithmetic average," which would be 80.5.

[23] The Hurona, 268 F.910 (S.D. N.Y., 1920).

[24] Similarly: Sirie v. Godfrey, 196 App. Div. 529, 188 N.Y.S. 52 (1921); Liberty National Bank of New York v. Burr, 270 F. 251 (1921); Metcalf Co. v. Mayer, 213 App. Div. 607, 211 N.Y.S. 53 (1925).

[25] See the cases cited in New York Annotations, Restatement of the Law of Conflict of Laws, American Law Institute (1934) 275.

[26] Effinger v. Kenney, 115 U.S. 566, 6 Sup. Ct. 179, 29 L. Ed. 495 (1885). As to note drawn payable in confederate money, Stewart v. Salamon, 94 U.S. 434, 24 L. Ed. 275 (1876). Bond executed in Confederate State: Rives v. Duke, 105 U.S. 132, 26 L. Ed. 1031 (1881). Damages connected with sale of property: Wharton v. Cunningham, 46 Ala. 590 (1871); also Hill's Administrator v. Erwin, 60 Ala. 341 (1877). See also Gray v. Harris, 43 Miss. 421 (1871), Rowland v. Thompson, 73 N.C. 504 (1875), Palmer v. Love's Executors, 75 N.C. 163 (1876), Parker v. Wilson 5 S.C. (5 Rich.) 485 (1874), Taylor v. Bland, 60 Tex. 29 (1883), Stearns v. Mason, 24 Grat. 484 (1874). An interesting isolated decision where the amount of a bond

situation, and it can be well argued that the issue was not the conversion of one kind of money into another, since, theoretically, the courts in remaking the contracts of the parties, substituted *ab initio* lawful money of the United States for the original money of account.

The significance of all these cases for the purposes of this study, is that they demonstrate that the present rules are by no means ancient precepts imbedded somehow in the very foundations of Anglo-American law, and that the breach-day rule became generally accepted only when so many foreign currencies depreciated so markedly in terms of the American dollar after World War I.

England

Stipulation of foreign currency is valid under English law.[27] Agreement of parties on conversion rate is also valid.[28] Judgment cannot be rendered in any other money than in pounds sterling, and the rule is now well-settled that, in converting a foreign money obligation into pounds sterling, the rate to be used is that current at the time of the breach of contract (or when the debt became due) or when the tort out of which the obligation arose was committed.[29]

There are early cases[30] in which foreign money was converted at the rate of the day when judgment was rendered.

In English legal literature, until the early 1930's, the breach-day rule was generally accepted as the obvious rule. "The doctrine is clearly sound in principle, and any other decision would afford temptation to

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reduced to its *gold* value at its date was compared to the purchasing power of confederate notes at due date of the bond is found in Bailey v. Stroud, 26 W. Va. 614 (1885). *Cf.* also Bierne v. Brown's Admin. 10 W. Va. 748 (1877).

[27] Mann, The Legal Aspects of Money (1938) 135 and 26 *et seq.*

[28] Manners v. Pearson [1898] 1 Ch. 581, 592 per Vaughan Williams L.J.

[29] Mann, *ibid.* p. 280–312. Dicey, Digest of the Law of England with reference to the Conflict of Laws (fifth ed. 1932) 728–731, citing Di Ferdinando v. Simon, Smith & Co. [1920] 2 K.B. 704, *per* Roche, J. affirmed by the Court of Appeal, [1920] 3. K.B. 409; 36 T.L.R. 797; Barry and others v. Van den Hurk, [1920] 2 K.B. 709, 712 *per* Bailhache, J.; Lebeaupin v Crispin, [1920] 2 K.B. 714, 722 *per* McCardie, J.; British-American Continental Bank, Ltd., in re: Lisser's Claim, [1923] 1 Ch. (C.A.) 276; Golzicher's Claim, [1922] 2 Ch. (C.A.) 575. These cases definitely dispose of the earlier judgement of Roche, J., in Kirsch v. Allen, Harding & Co. (1919), 89 L.J.K.B. 265; reversed on facts (1920) W.N. 73, which was in accord with Story, §§308–3119.

[30] Particularly in the field of conversions of debts, Mann, *op. cit.*, 292 citing Bertram v. Duhamel (1838) 2 Moo. P.C. 212 and a number of dicta, and argues that Société des Hotels Le Touquet v. Cummings [1922] 1 K.B. 451, implies the judgment day rule; Dicey *ibid.* (*supra*, note 29) also remarks that "there is some early authority in favour of taking the date of judgment as the criterion in such cases (debts)," citing Scott v. Bevan (1831) 2 B. &. Ad. 78, Manners v. Pearson & Son [1898] 1 Ch. (C.A.) 581.

litigants to delay proceedings in the hope of profiting by the fluctuation in exchange rates."[31] As the pound sterling itself underwent some devaluation, the approval died down,[32] but the explosive economic forces that revoked similar rules on the Continent[33] were not explosive enough to change the established rule, since—fortunately—the degree of devaluation was incomparably smaller than the depreciation in certain Continental countries and often went *pari passu* with the devaluation of other currencies which were considered stable.

Switzerland

Article 84 of the Statute concerning the law of obligations[34] provides that, unless there is stipulation to the contrary, foreign money obligations may be discharged in national currency at the rate prevailing at the time when the obligation became due. While other European countries which had similar provisions but suffered heavy depreciation of their currencies, were forced to abandon the rule[35] and change to a conversion rule placing the burden of depreciation on the defaulting debtor, Switzerland, having escaped major currency depreciations, was able to retain the rule.

The breach-day rule was applied also when the foreign money depreciated before due date, because, it was held, the creditor took the risk

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[31] Dicey, *ibid.*

In the Geneva proceedings concerning the uniform law for bills of exchange, in discussing the conversion rule with delegates of some countries in which there had been disastrous depreciations, the delegate of Great Britain, Mr. Gutteridge, characteristically said that "the English rule was that the rate of exchange was calculated on the day on which the bill fell due. Bills in England were always payable in English currency; payment in foreign currency was not allowed. They must always be paid in English currency if the holder so demanded, and he thought that this was a rule which worked very well." League of Nations, Records of the International Conference for the Unification of Laws on Bills of Exchange, Promissory Notes and Cheques (Off. No. C. 360. M. 151, 1930. II) p. 233.

[32] *Cf.*, e.g., the comments of Mann, op. cit., 306–312, or by the same author "Rate of exchange, an urgent appeal for a minor reform of the law," 15 Modern L. Rev. (1952) 369–71, emphasizing the unjustified loss inflicted upon the creditor if the breach-day rule is applied in a case where the pound sterling depreciates after due date. The author advocates a new rule for conversion at the date of payment.

[33] *Infra*, pp. 165, 167, 169, 172, 173, 175.

[34] Das Obligationenrecht. Bundesgesetz betreffend die Ergänzung des schweizerischen Zivilgesetzbuches vom 30. März 1911. Art. 84.

"Geldschulden sind in Landesmünze zu bezahlen.

"Ist im Vertrage eine Münzsorte bestimmt, die am Zahlungsorte keinen gesetzlichen Kurs hat, so kann die geschuldete Summe nach ihrem Werte zur Verfallzeit dennoch in der Landesmünze bezahlt werden, sofern nicht durch den Gebrauch des Wortes 'effectiv' oder eines ähnlichen Zusatzes die wortgetreue Erfüllung des Vertrages ausbedungen ist."

[35] *Cf.* for France, p. 165, Belgium, p. 167, Italy, p. 170, Hungary, p. 176, Austria, 173.

of such loss when he contracted in the foreign money;[36] nevertheless, when the law of the contract or the *lex monetae* revalued the obligation (*Aufwärtung*) the Swiss courts applied the revaluation rules.[37]

The breach-day rule in itself, of course, does not protect the creditor against a defaulting debtor if the latter performs in kind in depreciated foreign money. The Swiss courts, however, award damages against the tardy debtor in such a case to compensate for loss, on the assumption that, had the debtor performed in time, the creditor would have converted the foreign money into domestic currency; if the debtor is able to prove that the creditor would have left the funds in the foreign money and would have suffered the loss even if performance had been in time, no compensation is given.[38]

When contracts had been made in a presumably stable currency in order to guard the creditors against loss through depreciation, but in the course of events the foreign money (dollar, pound sterling) depreciated in terms of Swiss francs, there were attempts to obtain conversion at the rate prevailing at the time when the contract was made. Unlike the courts in some other countries,[39] the Swiss courts resisted the temptation to remake the contract, applied Article 84 of the Statute, and converted at the rate on the due date.[40]

Foreign money in bills of exchange and checks is converted according to the rules of the uniform laws of the Geneva Conventions, which will be discussed below.[41]

France

Contractual stipulations for payment in foreign currency, or for the value of foreign currency, are invalid as against public policy,[42] unless they are part of an "international" contract[43] with funds crossing back

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[36] BGE. 49. II. 12; 51. II. 406. *Cf.* Theo Guhl, Das Schweizerische Obligationenrecht (1948) 76–77.

[37] BGE. 51. II. 303; 53. II. 76; 54. II. 214; 57. II. 368 and 596. *Cf.* Guhl, *op. cit.*, p. 77. For a summary of the revaluation practices, see e.g., Adolf F. Schnitzler, Handbuch des Internationalen Handels-, Wechsel-, und Checkrechts (1938) 309–312.

[38] Schnitzler, *op. cit.*, at 306, citing B.G. 60. II. 340; 57. II. 73, 54. II. 257 ff (266, 23. 5. 1928).

[39] See *infra* p. 180.

[40] BG. 57. II. 370; 53. II. 81; 51. II. 308.

[41] *Infra*, p. 177 *et seq.*

[42] "contraire à l'ordre public."

[43] Arrêt of the Cour de Cassation of the 17th May, 1927 (D.P., 1928. I. 25) and the many cases cited below; see also recent note of Y. Loussouarn in 42 Revue critique de droit international privé (1953) 376–390, at 385; Andre Mater, Traité Juridique de la Monnaie et du Change (1925) *passim*; Fuzier-Herman, 3 Code Civil Annoté (1936) 562.

and forth.[44] It is still a controversial issue whether foreign money obligations are to be discharged by payment in kind[45], but there is no doubt that in a majority of the situations the foreign money obligation is to be converted into francs.[46] The problem of immediate interest for the purposes of this study is the time which determines the rate of exchange at which conversion is to take place. The French Civil Code is silent on the subject.[47]

The agreement of the parties on what rate of conversion should be applied is respected by the courts,[48] and an implied agreement has been read into the contract by interpretation in some cases.[49] Where the parties remained silent on the subject, the French courts have shown the same vacillation as the courts of the other countries under review.

The doctrine presently most widely accepted is that foreign money is to be converted at the rate of exchange prevailing on the day when payment is actually made.[50] This rule, however, is not and has not been ap-

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[44] "Mouvement de flux et de reflux de valeurs."

[45] "Versement effectif d'espèces étrangères."

[46] See e.g., Loussouarn, *op. cit.* at 386–388.

[47] Mater, *op. cit.*, 271. According to the author (*ibid.*, 258) Art. 338 of the Code de commerce, dealing with marine insurance, is the only statutory rule dealing with the conversion of one money into another. "Tout effet dont le prix est stipulé dans le contrat en monnaie étrangère est évalué au prix que la monnaie stipulée vaut en monnaie de France, suivant le cours *à l'époque de la signature de la police*" (emphasis added). Mater explains (p. 260) that this rule was taken over from Art. 11 of the Declaration of August 17, 1779, enacted to prevent insurance abuses. The money of the colonies, e.g., of Martinique, was at an agio, selling for about one third less at that time than francs in Paris. If the valuation of the merchandise in money of the colonies had not been converted at the rate when the policy was issued, says Mater, the insured would have received an unjustified windfall. The rule in the Declaration of 1779 was *jus cogens*, that of Art. 338 of the Commercial Code *jus dispositivum*.

[48] Fuzier-Herman, *op. cit.*, note 43, p. 562, citing Cass. req., 23 April 1928 (D. hebd., 1928, p. 302); Req., 8 June, 1926 (S. 1926. I. 296); Paris, 16 April 1928 (S. 1929. 2. 14).

[49] *Ibid.*, citing Cass. req. 10 March 1925 (D. hebd., 1925, p. 237); 16 June 1925 (D. hebd., 1925, p. 498).

[50] Cas. req. 8 Nov. 1922 (S. 1923. I. 149); Civ. 9. March 1925 (D. hebd. 1925, p. 329; S. 1925. I. 257); Req. 16 June 1925 (D. hebd., 1925, p. 498); 5 Dec. 1927 (S. 1928. I. 138); 19 Apr. 1930 (S. 1930. I. 339); Bordeaux, 23 May 1921 (Gaz. Pal. 1921. I. 187); Paris, 18 Oct. 1922 (Gaz. Pal., 1922. 2. 483); 26 Apr. 1923 (S. 1923. 2. 150); Rouen, 13 Nov. 1924 (Gaz. Pal., 1925. I. 280); 6 Apr. 1925 (Gaz. Trib., 30 Oct. 1925); Paris, 15 July 1925 (S. 1925. 2. 111); Trib. civ. Vosges, 8 Jan. 1929 (D. hebd. 1929, p. 174; S. 1929. 2. 55). Cf. Fuzier-Herman, 3 *op. cit.*, 562; Loussouarn, *op. cit.*, 389–390; see also, Mater, *op. cit.*, 283, citing as to purchase price of goods: Lyon, July 2, 1920 (Mon. Lyon, 27 Dec. 1920); Trib. civ. Annecy, Dec. 2, 1920 loc. cit.); as to rent: Trib. sup. Colmar, 24 Oct. 1921 (Gaz. Pal., Febr. 18, 1922); as to contract of affreightment: Trib. com. Nantes, 30 Oct. 1922 (Recueil Nantes, 1922 p. 304). Where partial payment was made in francs on a peseta debt, the franc amount was converted into pesetas at the rate of the day of payment, deducted from the total amount of the debt, and the judgment ordered the balance to be converted into francs at the rate prevailing on the day of actual payment (Trib. com. Marseille, Oct. 12, 1920; Journal de

plied universally, and was different even in the recent past. At first sight, the judgments seem, in Mater's words, "erratic and contradictory."[51] They appear to be less so, however, and tend to fall into a pattern if the facts of the seemingly contradictory judgments are analyzed. The payment-day rule became relatively dominant only at a time when, and in connection with cases in which, the foreign money appreciated in comparison to the franc. The object was "to punish the debtor for the tardy performance of his obligation."[52] Consequently, the rate of the day when the obligation was due was applied, preponderantly, if not exclusively, in cases where either the adverse movement of rates caused loss to the creditor but the debtor was not at fault, or this rate was the less advantageous one to the debtor in default.[53] (It must be remembered that

jur. com. de Marseille, 1921. 1. 180; Mater, *op. cit.*, 284). Where a French bank instructed an American bank to open credits and refused to reimburse the American correspondent, the dollar amount due was converted—after a considerable depreciation of the franc in terms of the dollar—at the rate prevailing on the day of payment (Mater, *op. cit.*, 284, citing Paris, 26 April 1923, Gaz. Pal., 1923. 1. 740). Where a shipper suffered loss in course of transportation to Switzerland, and the carrier argued that loss due to adverse movement of the exchange rate could not be foreseen and therefore should not be chargeable to him, the court nevertheless converted at the rate of day of payment (Cour d'appel Paris 5e Ch, 26 Oct. 1951; Rev. Crit. droit int. privé 1953. 377). In the interesting case of Beaudoin v. Sté. New Yorkaise Transatlantic Commodities Corp. & Ste. Alsol (42 Rev. crit. droit int. privé, 1953, 382), Transatlantic suffered damages in dollars by defendant's breach, which were converted at the rate of the day of payment, but the damages suffered by Alsol, who acted as agents and whose loss was a percentage of the sales price expressed in dollars, were converted at the rate prevailing at the time when the contract was made. In Cie. United States Lines v. Ministre des Finances (Cour d'appel Paris, 20 Oct. 1952; 42 Rev. crit. droit int. privé, 1953, 384) the dollar amount established as due in connection with a general average was ordered to be converted at the rate of day of payment. The court added that otherwise the creditor would have received a sum smaller or larger than what is due to him depending on the variation of the rate ("... autrement le créancier recevrait une somme inférieure ou supérieure à ce qui lui est dû, suivant les variations des changes"). It will be noted that almost identical language has been used by courts of various countries at various times to justify the due-date, judgement-day, and payment-day rules.

[51] Mater, *op. cit.*, 270–271.

[52] *Ibid.*, at 283. At 272 he argues that the choice of converting at the rate of the day of payment does not rest on any basic rule of law; the motivation is simply to inflict upon the tardy debtor the rate which is most unfavorable to him, which is almost always the rate of the day of payment. While the courts usually merely apply the day of payment rate without giving an explanation, in at least one case (Paris, 18 Oct. 1922, Revue du droit bancaire I. 116) the punitive motivation was expressly spelled out. In a case cited by Mater (*ibid.* at 274) the principle was applied in a reverse situation: the creditor was tardy in demanding payment, obviously speculating to obtain conversion at a better rate, and the court held that he was entitled only to conversion at the rate on due date (Paris, 30 April 1923, Gaz. des Trib., Nov. 11, 1923).

[53] Besides the case cited above (note 52) see Nancy, 25 July, 1922 (Gaz. Pal. 1922. 2, 589) where due date was used for conversion as, although rate moved against creditor, delay was not caused by the debtor's bad faith ("pas imputable à la mauvaise foi du débiteur").

after World War I the French franc fell in terms of certain currencies, e.g., dollars and pounds sterling, but was firm in terms of other currencies, e.g., German marks, Austrian kronen, etc.) The rate of the due date is applied also where there are other special justifications for doing so; e.g., bonds in foreign money of corporations and states, and the foreign money due under their coupons, are converted at the rate of the due date even if actual payment is made later, the object being to obtain uniform treatment of all bond and coupon holders and simplify accounting between the local bank and the issuing institution.[54]

French courts have frequently applied also the rate when the debtor was "put into default" (*mise en demeure*), which corresponds roughly to —but is not identical with—the American rule applying the rate prevailing at the time when suit is commenced. The "default" of the debtor begins when it is officially established—by service of summons, levy of execution, etc.—that demand for performance was made.[55] This rate was applied, for instance, in cases in which war (World War I) prevented performance[56] and it was not equitable to charge the debtor with the burden of currency depreciation. In Russian rubles cases, where suit was brought in 1914, the rate of exchange moved against the creditor while action was pending; the court applied the rate prevailing at the time when suit was commenced, and not when tender at a much lower

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In the judgment of Trib. Com., Seine, 18 Febr. 1921 (Gaz. des Trib. June 19, 1921) a draft in rubles, payable in France, was converted at rate of due date because delay was the result of a moratorium. See also Trib. reg. Mulhouse, 14 Dec. 1921 (Revue juridique d'Als.-Lorr. 1922, 100.); Trib. comm. Seine, 10 Dec. 1923 (Gaz. Pal., 1924. I. 382) Trib. comm. Seine 9 Jan. 1924 (Clunet 1925, 414); Req., 17 Febr. 1937 (Rev. critique droit int. priv. 1938, 657); Cass. req. 16 July 1929 (D. hebd., 1929, 410; Clunet, 1929, 688). For cases where it was the creditor who delayed settlement in the hope of better rates, see Cass. civ., 10 Nov. 1926 (D. hebd., 1927, 3); Req. 16 July 1929 (D. hebd., 1929, 410); Paris, 30 Apr. 1923 (D. 1923, 2. 122); Toulouse, March 14, 1927 (Sem. jur. 1927, 458).

[54] Fuzier-Herman, *op. cit.*, p. 563 citing Trib. civ. Seine, 11 Dec. 1922 (Gaz. Trib., 1923. 2. 176); Paris, 17 July 1925 (Gaz. Pal., 1925. 2. 553); Demogue, Rev. de dr. civ., 1923, 506 and 1926, 148. Primary sources could not be looked up on this point, but it is believed that the bonds (and coupons) in question contained stipulations as to the methods of conversion which were applied by the courts.

[55] See e.g., Colin-Capitant—de la Morandière, Cours élémentaire de droit civil français (1935), at 88. The word "*demeure*" derives from the Latin "*mora*" meaning "delay," but the two are not synonymous; a debtor who does not perform his obligation when due is not yet "*en demeure*," this begins when the nonperformance is officially established and the creditor's formal demand is made by service of summons or some other act considered its equivalent. In some cases the agreement of the parties or the law itself makes it unnecessary that the official act be performed and *dies interpellat pro homine*. *Cf.* 3 Fuzier-Herman, *op. cit.*, at 219 and 243, or Brunet-Servais-Resteau, 9 Répertoire pratique du droit Belge (1951) at 115 *et seq.*

[56] See Mater, *op. cit.*, at 281, citing judgments dated between 1921 and 1923.

rate was made.[57] In this case, therefore, conversion at the rate when suit was started served to protect the creditor. On the other hand, when this rate was applied against a German creditor[58] who during the depreciation of the mark had delayed enforcement of his right arising out of prewar transactions, the court protected the French debtor against the creditor whom it considered negligent.

The French courts apply, as has been seen, various rates in converting foreign money obligations into francs, viz., those of the due date, commencement of suit, date of payment.[59] But the diversity of rates appears to be largely the manifestation of a set of rules that are not in conflict with each other. The situation may be summed up as follows: the overwhelming majority of judgments hold that foreign money is to be converted into francs at the rate on the day of payment. If the debtor is in bad faith or is at fault,[60] however, the creditor is entitled to the rate most advantageous to him as compensation for the loss caused by adverse movements of exchange rates. If the creditor is tardy in enforcing his rights, the rate which is advantageous to the debtor will be used.

Belgium

Belgian law, generally similar in so many respects to the French, differs from the latter in its rules concerning foreign money obligations fundamentally by admitting the validity of stipulations to pay foreign money, or their equivalent in domestic currency, regardless of whether the contract is purely domestic or involves international transactions.[61] Similarly to Anglo-American law, judgment can be rendered for payment only of domestic money,[62] but judgment for the equivalent of foreign money stated in the judgment, to be converted at the rate of the day when

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[57] *Ibid.*, 281–2, citing Paris, 12 April 1916 (Le Droit, 20 May, 1916); Cass. 11 July, 1917 (Sirey, 1918–19. 2. 215). The rate of the day when suit was brought was applied, e.g., also where a French buyer owed marks, under a prewar transaction, to a German seller.

[58] Paris, 31 Oct. 1922 (Revue du droit bancaire I. 308), Mater, *op. cit.*, 282.

[59] The diversity is actually even greater. On rare occasions the rate of the day of judgment was applied instead of the day of payment (cf. Mater, *op. cit.*, 285–6). The mint par was applied for conversion of a pound sterling debt into francs when, during the war between England and France, the "free" exchange was not considered free enough by the court, Mater, *op. cit.* 290. Rennes, 2 March, 1813 (Dalloz, Jur. gen. v. Monnaie, No. 73). Bills of exchange made out in foreign money are converted according to the rule of the Uniform Law, see *infra*, p. 177 *et seq.*

[60] The usual term used is "*la mauvaise foi ou la faute*," *cf.*, e.g. Mater, *op. cit.*, 272.

[61] Brunet-Servais-Resteau, 8 Répertoire Pratique du Droit Belge (1951), 398.

[62] Art. 3 of the Law of December 30, 1885.

actual payment is made, is permissible.[63] Vacillation between the various rates is present also in this country's decisions.

The parties are free to stipulate the rate of conversion.[64] The overwhelming majority of decisions have adopted the rate prevailing when actual payment is made,[65] regardless of whether the domestic money appreciated or depreciated compared to the foreign money. (Belgian currency depreciated after World War I in terms of some currencies, and appreciated in terms of others.) Sometimes,[66] the rate of the day when the debtor was "put into default,"[67] and sometimes the rate on the due date, have been applied.[68] The judgments applying the latter rate were inspired by a desire of the courts to alleviate the loss of the creditor caused by delayed payment at times when the foreign money of the contract depreciated in terms of Belgian currency.[69]

The "day of payment" rule protects the creditor when the domestic money depreciates in comparison to the foreign money of the obligation, but not when it is the *foreign* money which falls. When the Belgian courts applied nevertheless the rate of payment in the latter situation, they awarded damages[70] separately in the majority of instances[71] to compensate

[63] *Cf.*, e.g., Brunet-Servais-Resteau, *op. cit.*, 399. By this method the money of account remains foreign money until payment, and it may be argued that the judgment is actually in foreign money.

[64] Cass. 14 May 1925, Pasicrisie belge I, 245; Journ. des Trib. 351.

[65] "Les cours et tribuneaux condamnent, dans cette solution actuellement unanimement consacrée, à payer la contre-valeur en francs belges de la somme de monnaie étrangère, calculée au cours . . . du change du jour du payment effectif, soit que la monnaie étrangère ait baissé de cours par rapport au franc depuis la naissance de la dette, soit que le franc ait baissé par rapport à la monnaie étrangère." Brunet-Servais-Resteau, *op. cit.*, 398, citing Piret, Les variations monétaires et leurs répercussions en droit privé belge (1935), p. 87 *et seq.*

[66] Liège, 12 Febr. 1924, Jurisprudence de la cour d'appel de Liège, 105, cited by Brunet-Servais-Resteau, *op. cit.*, 398.

[67] "*Mise en demeure.*" *Cf. supra*, note 55.

[68] Bruxelles, 17 Nov. 1920, P.A. 1921, 208; Liège, 31 March 1926, Jur. Liège, 114; Huy, 11 Dec. 1924, Jur. Liège, 1925, 155; comm. Anvers, 23 July 1917, Pas. belge III, 349; comm. Gand, 31 March 1920, Pas. belge 1921, III. 62; comm. Bruges, 20 May 1920, Pas. belge 1922, III. 9; 22 Jan. 1925, Journ. des Trib. 504.

[69] Brunet-Servais-Resteau, *op. cit.*, 398.

[70] Comm. Bruxelles, 4 Dec. 1923, Rev. banc. belge 137; 21 March 1924, Jur. Com. Brux. 294; 24 Sept. 1932, Jur. Com. Brux. 278; 10 Apr. 1933, Belgique judiciaire 441; 9 Apr. 1934, Jur. com. Brux. 261; comm. Anvers, 4 Febr. 1932, Jurisp. du port d'Anvers 98; comm. Gand, 11 Oct. 1934, Jur. com. Fl. 222. According to Brunet-Servais-Resteau, *op. cit.* 399; also: Bruxelles, 12 Jan. 1935 (Pas. belge II. 90) although the case, as reported, seems to contradict the rule denying damages, but this because no delay was proven and there was no "mise en demeure."

[71] Damages were denied in Gand, 5 April 1922, Pas. belge. II. 115, comm. Anvers, 27 March 1933; P.A. 143; 15 June 1933, P.A. 234; 11 Sept. 1933, P.A. 405; comm. Bruxelles 12 May 1932, Jur. com. Brux., 118.

for the loss suffered by the creditor. Bad faith of the debtor need not be proved; the very fact of nonperformance at due date is sufficient, provided he was "put in default."[72] No compensation is given if there is no loss, as when it is shown that had the creditor received payment on the due date in foreign money, he would have kept the funds in that foreign money or would have converted them into items that suffered the same depreciation.[73]

A special situation exists in respect to bills of exchange. Belgium did not adopt the Uniform Bill of Exchange Law of Geneva. The statute in force[74] expressly provides for the conversion of foreign money at the rate prevailing on the day of maturity.[75] After a certain hesitation by the courts, the term "date of maturity" has been interpreted to mean "day of actual payment" because "the legislator . . . permitting the debtor to pay in francs after conversion at the rate of the day of maturity, did not consider any other situation than the normal case when payment is made at maturity, and the general rule of conversion at the rate of the day of payment remains applicable in case of delayed payment."[76]

Italy

The mode of conversion of foreign money into domestic currency has been regulated in Italy by the Civil Code, the Commercial Code, and the Law concerning Bills of Exchange.[77]

The Civil Code provides[78] that if the sum of money owed is not legal

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[72] "Il est en faute par le fait même qu'il ne paye pas à l'échéance" Brunet-Servais-Resteau, *op. cit.*, 399.

[73] Comm. Bruxelles, 6 Febr. 1934, Journ. des Trib. 527; 2 May 1935, Jur. com. Bruxelles 165; *cf.* Guisan, La dépréciation monétaire et ses effets en droit civil" (1934), 43.

[74] Art. 33 of the Law of May 20, 1872.

[75] "Une lettre de change doit être payée dans la monnaie qu'elle indique. S'il s'agit d'une monnaie étrangère, le payement peut se faire en monnaie nationale *au cours du change du jour de l'échéance* ou au cours fixé par l'effet, à moins cependant que le tireur n'ait prescrit formellement le payement en monnaie étrangère" (emphasis added).

[76] Brunet-Servais-Resteau, *op. cit.*, 399, citing Bruxelles, 2 June 1924, B.J. 1925, 37; 28 April 1926, Pas. belge II. 166; 12 July 1926, P.A. 302; Fontaine, De la lettre de change et du billet à ordre, (1934) No. 809.

[77] Since the Uniform Law for Bills of Exchange has been adopted by Italy (Reggio-Decreto Legge 25 Agosto 1932, No. 1130, Esecuzioni delle Convenzione stipulati a Ginevra il 7 giugno 1930 fra l'Italia ed altri stati per l'unificazione del diritto cambiario) the rules presently in force concerning conversion of foreign money in a bill of exchange or promissory note will be discussed below (p. 177) in connection with the Uniform Law.

[78] Art. 1278 of the new (1942) Civil Code, approved with the Royal Decree of 16 March 1942—XX. No. 262: "*Debito di somma di Monete non aventi corso legale*—Se la somma dovuta è determinata in una moneta non avente corso legale nello Stato, il debitore ha la facoltà di pagare in moneta legale, al corso del cambio nel giorno della scadenza e nel luogo stabilito per il pagamento."

tender in Italy, the debtor has the option to pay in national currency, converted at the rate of exchange prevailing on the day when, and place where, the obligation becomes due, unless payment in kind is expressly stipulated.[79] The abrogated Commercial Code[80] had the same provision with the difference that it more specifically said that the conversion rate is the rate for sight drafts on due date and at the place of payment, adding that if there is no quotation in that place, the nearest market for bills shall prevail. The provisions of the old Civil Code[81] were essentially the same as those of the new Code.

During the violent oscillation of foreign exchange rates in the 1920's, it became of great importance to establish what is meant by "due date" (*giorno della scadenza*), and it was argued with insistence that the legislator—both in the Civil Code and in the Commercial Code—really meant "day of payment" in speaking of due date.[82] The object was to come to the aid of the creditor in case of default by the debtor in a period when the national currency was losing its value in terms of a number of foreign currencies. This issue was of particular significance in those days because, contrary to the present law,[83] the old Civil Code did not permit other compensation than interest for damages suffered due to delayed performance of monetary obligations.[84] Bonelli argued[85] that the expression "due date" was used merely to distinguish the date of maturity and payment from the date when the contract was entered into. A great majority of the judgments of that period were based on these arguments for conversion at the time of actual payment[86] in spite of the express statutory provision for conversion at due date!

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[79] *Ibid.*, Art. 1279: "*Clausola di pagamento effettivo in monete non aventi corso legale.*—La disposizione dell'articolo precedente non si applica, se la moneta non avente corso legale nello Stato è indicata con la clausola 'effettivo' o altra equivalente, salvo che alla scadenza dell'obbligazione non sia possibile procurarsi tale moneta."

[80] Art. 39: "Se la moneta indicata in un contratto non ha corso legale o commerciale nel Regno, e se il corso non fu espresso, il pagamento può esser fatto colla moneta del paese, secondo il corso del cambio a vista nel giorno della scadenza e nel luogo del pagamento, e, qualora ivi non sia un corso di cambio, secondo il corso della piazza piu vicina, salvo se el contratto porta clausola effettivo od altra equivalente."

[81] Art. 1821 of the Civil Code of 1865, replaced by Art. 1278 of the 1942 Code, see *supra*, notes 78 & 79.

[82] *Cf.* Bonelli, "I pagamenti fuori scadenza dei debiti in moneta estero." Riv. Bancaria, 1922, 261; Cobianchi, Riv. dir. comm., 1922. II. p. 67.

[83] See *infra*, *p.* 170.

[84] Art. 1321 of the Civil Code of 1865.

[85] *Ibid.*, note 82, *supra*.

[86] Cass. Roma, 28 June 1924, Foro it., 1924, I, 170; Cass. Torino 9 June 1922, Foro it. 1923, I, 907; Cass. Torino, 1 Aug. 1923, Foro it. 1924, I, 21; Cass, Torino, 9 June 1923, Giurispr. Ital. 1923, I, 1, 847; Appello Genova 12 Nov. 1922, Foro it., 1923, I, 137; Cass. Torino,

It was easy to show, particularly in the field of commercial law, that the legislator could not have naïvely failed to differentiate between due date and date of payment, because he *did* distinguish between the two in Articles 1173 and 1225 of the Commercial Code. There is, furthermore, no reason to suppose that the legislator, in using the term *due date* wanted to distinguish between date of contracting and the day on which conversion should take place, but not between due date and date of payment.[87] In spite of this, only a handful of judgments applied the express provision of the Code.[88]

The new Civil Code has the same provision as to the time of conversion as the old and reiterates the rule that the rate of the day on which the obligation becomes due shall be applied. Since this (1942) rule was enacted after bitter controversy, there can be no doubt now that the legislator was conscious of the distinction and that the choice was made deliberately. The new Code, however, supplements the conversion rule with a provision for compensation for damages caused by delay in performance which makes the conversion rule workable whether the foreign exchange rates move up or down.

According to Article 1224 of the (1942) Civil Code,[89] unless there is an

4 March 1922, Foro it., 1922. I. 451; App. Torino 21 Apr. 1922, Foro it., 1922. I. 161; (in which case the *foreign* money was devalued, and day of payment rule benefited the debtor!) App. Milano, 22 Nov. 1921, 25 Febr. 1921, Monit., 1921, 540; App. Torino 1 Dec. 1921, Giurispr. Torinese 1922, 766; App. Genova 22 Dec. 1921, Riv. di dir. com. 1922, 2, 67; App. Genova, 5 July 1919, Tribunale di Milano 7 May 1921, Appello di Genova 19 May 1922, Riv. dir. civ. 1920, 404; 1921, 383 and 1922, 296.

[87] *Cf.*, e.g., Giovanni Pacchioni's chapter on monetary obligations in D'Amelio-Finzi, I Codice Civile, Libro delle Obbligazioni. Commentario (1948), 227. The author also argues that since the legislator in some European countries provided for conversion on due date (besides Italy, he cites the Austrian and Swiss Codes) while in others on the day of payment (Germany), the legislators did differentiate between the two concepts. This, however, seems to be begging the question: if it is argued that the legislator did not know what he was talking about, it may just as well be argued that both groups of legislators meant the same thing and merely used different terms because they were not conscious of the difference.

Also: Cesare Vivante, Trattato di Diritto Commerciale (1935), p. 64, favoring the literal interpretation of the statute, among other reasons, on the ground of the not too impressive argument that it is a fundamental principle of the law of obligations that the object of obligations be valued as on due date and not the date of performance.

[88] Tribunale di Milano, 14 July 1921, Monit., 1921, 333; App. di Torino, 21 Apr. 1922 Giurispr. Tor. 1922, 650; Cass. Firenze, 9 June 1923, Foro it., 1923, 796; Cass. Roma, 22 Dec. 1923, La corte di cassazione, 1924, I. 17. *Cf.*, Vivante, *op. cit.* Vol. IV, p. 64.

[89] Art. 1224 of the (1942) Civil Code: "*Danni nelle obbligazioni pecuniarie.*—Nelle obbligazioni che hanno per oggetto una somma di danaro, sono dovuti dal giorno della mora gli interessi legali, anche se non erano dovuti precedentemente e anche se il creditore non prove di aver sofferto alcun danno. Se prima della mora erano dovuti interessi in misura superiore a quella legale, gli interessi moratori sono dovuti nella stessa misura.

"*Al creditore che dimostra di aver subito un danno maggiore spetta l'ulteriore risarcimento.* Questo non è devuto se è stata convenuto la misura degli interessi moratori" (emphasis added).

agreement between the parties as to the rate of interest for delay in performance, the creditor is entitled to receive compensation for the loss caused by delay in performance, provided he can prove that his loss is greater than that covered by legal interest.[90]

Germany

Article 244 of the German Civil Code[91] provides[92] that when an obligation in foreign money is to be performed in Germany, payment may[93] be made in domestic currency, unless performance in kind is expressly stipulated. Conversion is to be made[94] at the rate[95] prevailing at the time and place of payment.[96] This rule, protecting the creditor against defaulting debtors should the German money depreciate in terms of foreign money, worked very well during the periods of inflation.

Before the inflation of World War I, the German courts interpreted the term "time of payment" to mean "day when the obligation falls due."[97] This phenomenon is very interesting for the purposes of this study because it complements the action of courts of other countries which, in the teeth of express provisions of their statutes providing for conversion at *due date*, interpreted day of maturity to mean *day of pay-*

[90] Cass. civ. massima consolidata, Mass. Giur. Ital., 1948, 483 (Repertorio Generale, Anni XLIX–L, 1725) which also holds that if the debtor performs by paying foreign money in kind, no damages can be claimed to compensate the creditor for the devaluation of the foreign money between due date and date of payment. *Cf.* Amelio-Finzi, *op. cit.* pp. 227 et seq. and pp. 105–106; Vittorio Angeloni, La cambiale e il vaglia cambiario (1949), note (1) p. 380, adding that if the creditor is in delay (*mora accipiendi*) there is no *mora debendi* and the debtor may deposit the sum owed, converted into lire according to the rate prevailing on due date.

[91] Bürgerliches Gesetzbuch vom 18 August, 1896 (R.G.Bl. 195).

[92] Art. 244: "Ist eine in ausländischer Währung ausgedrückte Geldschuld im Inlande zu zahlen, so kann die Zahlung in Reichswährung erfolgen, es sei denn, dass Zahlung in ausländischer Währung ausdrücklich bedungen ist.

"Die Umrechnung erfolgt nach dem Kurswerte der zur Zeit der Zahlung für den Zahlungsort massgebend ist."

[93] Debtor's *facultas alternativa*.

[94] The rule is *jus dispositivum*, and parties may stipulate a different method of conversion. Cf. Soergel, *op. cit.*, *infra* note 95, at 672; R.G. JW. 26, 249; Recht. Rundschau f. Zivilsachen 26, No. 401; Drz. 26, No. 150.

[95] If there is no official rate, other valuations may be referred to. *Cf.* Soergel, 1 Bürgerliches Gesetzbuch, 672, citing Hamburger Bank A. XVI, 309, Hans. G. Z. 17 Bbl. 96.

[96] *Ibid*, citing RG ver. ZS in RGZ 101, 312; RG. JW. 24, 1593; RG Recht 24, No. 967; RGZ 149, 1. Also: Nussbaum J.W. 20, 13, 637; Brodmann J.W. 21, 411; Weinhagen J.W. 20, 594; Kaufmann LZ. 21, 441. Cf. also Dr. Ernst Heymann, Handelsgesetzbuch, (1926) 395, and cases there cited; also, Walter Erman, Handkommentar zum Bürgerlichen Gesetzbuch (1952), 280. Reichel in Arch. Ziv. Pr., 126, 324 argues that conversion should be carried out at the rate which is the highest between due date and day of actual payment. His argument, apparently, has not been followed by courts.

[97] "Fälligkeit, nicht Zeit der tatsächlichen Zahlung entscheidet." Dr. A. Achilles, Bürgerliches Gesetzbuch (1920), 119 (citing J.W. 18, 275. Seuffert's Archiv. f. Entscheidungen des

ment.[98] After World War I, in the period of inflation, it required a decision of the combined senates of the highest court of Germany (*Plenarbeschluss des Reichsgerichtes*)[99] to enforce the literal meaning of Article 244 of the Civil Code, namely that conversion is to be made at the rate of the day of payment and not of the due date.[100]

Since the end of the inflationary period after World War I, the German courts abstained from using again the device of a forced "interpretation" of Article 244 of the Civil Code; instead, when the debtor fell into delay and the foreign money of the contract depreciated between due date and the date of payment, the difference between rates was awarded as damages.[101]

When the dollar and pound sterling were devalued, in cases where the debt was originally established in reichsmarks, and was then recomputed in dollars or pounds at a given ratio (e.g., 1 Rm. to 10/42 of $), the Reichsgericht held that the casting of the obligation in foreign money was only intended to serve the purpose of protecting the value of the debt (*Wertbeständigkeitsklausel*) and ordered payment to be made at the original ratio used by the parties.[102] In commercial transactions, however, similar attempts of creditors were unsuccessful, and the foreign money was converted according to the general rules of conversion.[103]

Germany has adopted the uniform laws both for bills of exchange and for checks; conversion of foreign money stipulated in such instruments will be discussed below.[104]

Obersten Gerichtes, 73, 355; Rechtsprechung der Oberlandgerichte 38, 14) writes: "Wenn nötig, ergibt sich der geschuldete Betrag aus der Umrechnung, wobei derjenige Wert in Ansatz zu bringen ist, den die ausländische Währung zur Zeit der Zahlung, *d. h. zur Zeit der Fälligkeit* am Orte der Zahlung, nämlich am Erfüllungsorte . . . im Verkehr hat (RG. 96 S. 123 und 264)" (emphasis added).

[98] See p. 164 *et seq.*, p. 169, p. 174.

[99] Entscheidungen des deutschen Reichsgerichtes in Zivilsachen, 24 Jan. 1921, Vol. 101, No. 89.

[100] *Cf.* Nussbaum, Das Geld in Theorie und Praxis des deutschen u. ausländischen Rechtes (1925) at 222.

[101] "Ist eine Währungsverschlechterung erst nach Eintritt des Zahlungsverzuges eingetreten, so ist die Kursdifferenz grundsätzlich stets ersatzfähiger Verzugsschaden," Hans-Wilhelm Kötter, Handelsgesetzbuch (1950), 270, citing RGZ 147, 381; JW. 26, 1923; Warn 35, 32. In view of express contrary statutory provision, the rule is different in connection with German loans floated abroad, see Gesetz über Fremdwährungs—Schuldverschreibungen vom 26. 6. 36 (R.G. Bl. I. 515).

[102] Cf. Kötter, *op. cit.*, 270; RGZ. 146, 17; JW 35, 189, Warn 35. I. 48, 110 and 141; 37, 257.

[103] Kötter, *ibid.*; RGZ. 141, 220; 145, 51; 147, 286; 148, 41; 155, 133; 163, 324; J.W. 37, 2732 (4); Schnitzler, *op. cit.* (note 37 *supra*) and cases there cited.

[104] *Infra*, p. 177 *et seq.*

Austria

The Austrian Civil Code of 1811 had no general rule on the method of conversion of foreign money obligations, only a curious provision with regard to loans.[105] According to Article 989 of the Austrian Civil Code, loans must in general be repaid in the same currency in which the loan was made; if, however, the loan made in foreign currency is, nevertheless, paid in domestic money, conversion takes place according to the rate prevailing at the time when the obligation was incurred.[106]

The Austrian Commercial Code provided for conversion at the rate of due date, and this rule was extended by the courts by analogy also to noncommercial transactions.[107] The same rule applied to bills of exchange.[108]

In days of monetary stability, the rule caused no difficulty. After World War I, however, when the Austrian currency fell rapidly and debtors attempted to pay foreign money obligations long after due date but at the low rate that prevailed on due date,[109] the Austrian courts[110]

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[105] Provided the loan is not governed by the Commercial Code, in which case the conversion takes place according to Article 336 of the Commercial Code; see *infra*.

[106] Article 990. *Cf.* Schey, 1 Die Obligationsverhältnisse des österr. allg. Privatrechtes, 113. Arthur Lenhoff, writing the commentary to Article 336 of the Commercial Code in Staub's 2 Kommentar zum Allgemeinen Deutschen Handelsgesetzbuch, Ausgabe für Österreich (1936), 398, remarks that this provision is a peculiarity of the law relating to loans only, which corresponded to the philosophy of the days ("*Zeitgedanke*") when the Civil Code of 1811 was created.

[107] Article 336:

"Mass, Gewicht, Münzfuss, Münzsorte, Zeitrechnung und Entfernungen, welche an dem Orte gelten, wo der Vertrag erfüllt werden soll, sind im Zweifel als vertragsmässig zu betrachten.

"Ist die im Vertrage bestimmte Münzsorte am Zahlungsorte nicht im Umlaufe oder nur eine Rechnungswährung, so kann der Betrag nach dem Werte zur *Verfallzeit* in der Landesmünze gezahlt werden, sofern nicht durch den Gebrauch des Wortes 'effektiv' oder eines ähnlichen Zusatzes die Zahlung in der im Vertrage benannten Münzsorte ausdrücklich bedungen ist" (emphasis added).

[108] Article 37 of the "Wechselordnung." It is interesting to note that according to Goldschmidt, Handbuch des Handelsrechtes (1868), 1164, and Lenhoff *op. cit.*, 398, the "due date" came into the Wechselordnung by introducing *verbatim* II. 8, Art. 877 of the Prussian General Statute (Allgemeines Preussisches Landrecht), which in turn used due date (*Verfallzeit*) to contrast it with I. 11. Art. 786 of the same Prussian General Statute. Art. 786 provided for conversion at the rate of the day when the obligation was created. In using the word "due date" (*Verfallzeit*) the legislator—it was said—did not differentiate the same from the day of payment but from the day when the obligation was created. The arbitrariness of a similar argument was discussed in connection with the law of Italy (see supra, p. 169).

[109] The *special* laws enacted in that period provided for conversion at the rate of the day of payment, e.g., the law concerning railroad transportation (Art. 85, Eisenbahnverkehrsordnung).

[110] And the Chechoslovak courts in an identical situation.

interpreted due date to mean "day of payment," since payment was supposed to have taken place on due date![111] In this respect setoff was treated in the same way as payment.[112] After this new "interpretation" was adopted, the problem arose how to protect the creditor against the defaulting debtor in the reverse situation, when the foreign money depreciated between due date and day of payment. The courts held in cases where the delay was attributable to the fault of the debtor[113] that he is liable to pay the creditor as damages the difference between the rate on the day of payment and the rate on due date; this was awarded even if the debtor performed in the depreciated foreign money in kind.[114]

After the occupation of Austria by Germany, the German rule of converting foreign money at the rate of the day of payment was introduced by decree[115] to replace the rule of the old Commercial Code. This is still Austrian law.[116]

Austria adopted the uniform bill of exchange law of Geneva, but not the uniform check law. The latter, however, was adopted by Germany, introduced as German law into Austria,[117] and is still the law of the land.[118]

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[111] O.G.H., 22. I. 1935, Zeitschrift für Notariat (1935), 161. 12. II. 1919, Entscheidungen des österr. Obersten Gerichtshofes in Zivilsachen I/13; 1. X. 1918. Zentralblatt für juristiche Praxis, 1919, No. 81; 13. III. 1917, Zentralblatt 1917, No. 283; O. G. Brunn, 20. III. 1923, Slg. 2406. *Contra*: O.M.H., 17. Dec. 1930, Rechtsprechung, 1931 No. 1. Ohmeyer, Gerichtszeitung (1928) No. 35 through 38; Pisko, Lehrbuch des österr. Handelsrechtes (1923) 156; Ehrenzweig, "System des österr. Privatrechtes," 24; Wahle, "Gutachten zum 6. Deutschen Juristentag in der Tschechoslovakei," 209.

[112] O.G.H., July 10, 1935; Rechtsprechung (1936) No. 7.

[113] "Bei subjektivem Verzug des Schuldners."

[114] O.G.H., Febr. 26, 1935, Rechtsprechung, (1935), No. 212; Nov. 28, 1934, J.Bl. (1935) 167; March 18, 1932, Sz. XIV/77; April 28, 1925, Sz. VII/153; O.G. Brünn, March 29, 1927, Slg. 6939; Oct. 21, 1924, Slg. 4280; Dec. 11, 1923, Slg. 3277; Sept. 27, 1923, Slg. 3219. See Lenhoff, *op. cit.* p. 399; Pisko, Lehrbuch des österr. Handelsrechtes (1923) 156, Wahle, *op. cit.* p. 211.

[115] Vierte Verordnung zur Einführung handelsrechtlicher Vorschriften im Lande Österreich vom 24 Dezember, 1938. Art. 8, No. 8:

"(1) Ist eine in ausländischer Währung ausgedrückte Geldschuld im Inlande zu zahlen, so kann die Zahlung in Reichswährung erfolgen, es sei denn, dass die Zahlung in ausländischer Währung ausdrücklich bedungen ist.
(2) Die Umrechnung erfolgt nach dem Kurswert, der zur Zeit der Zahlung für den Zahlungsort massgebend ist."

"*Reichswährung*" was replaced by "*Schillingwährung*" by Art. 4. of the "Schillingrechnungsgesetz," 1945, B.G.Bl. 461.

[116] "Verfassungsgesetz vom 1, Mai 1945 (Rechtsüberleitungsgesetz) St.G. Bl. No. 6/1945, declared all laws and decrees enacted after March 13, 1938 to remain provisionally in force except if repealed. The decree cited above, note 115, was, it seems, not repealed.

[117] Verordnung über die Einführung des Scheckrechts im Lande Österreich vom 21. April, 1938, R.G.Bl. I. p. 422, G. Blfd. L. No. 116/1938.

[118] See *supra*, note 116.

Hungary

Hungary has had no civil code. The courts of Hungary, if the parties did not stipulate expressly that the foreign money obligation be paid in foreign currency, converted the obligation into national currency at the rate prevailing on the due date.[119] Under the impact of the inflation following World War I, this rule became unworkable, because, with the rapid rise of the rates of all "stable" foreign monies, the defaulting debtor would have reaped an unjustified benefit at the expense of the creditor. The courts, therefore, began to convert foreign money obligations at the rate prevailing on the day of payment.[120] When uncertainty developed as to the correct rule, the issue was decided by the highest court of the country, the Curia,[121] the decision being incorporated in a collection, the *Polgári Határozatok Tára*.[122] The rule adopted was that the conversion of foreign money obligations—unless the parties agreed otherwise—shall take place at the rate prevailing on the day of payment.[123, 124]

In the commercial law of Hungary, which, unlike civil law, had a code, the change of rule is even more significant. The Commercial Code of Hungary,[125] Article 326, provides that foreign money obligations,—unless the parties expressly stipulate that payment shall take place in kind—are to be paid in domestic currency according to the rate prevailing on the day when the obligation became due.

In spite of the express provision of the law, the courts began to deviate from this rule early during World War I in order to relieve creditors from loss caused by delayed performance by their debtors while the korona depreciated. But apart from these sporadic cases, the courts continued to apply the rule of the Commercial Code. When the Curia changed its rule with regard to civil cases, the courts applied the payment day rule

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[119] P. III. 755/1923 and decisions cited therein; M.D. XVII. 43. 2, Szladits-Fürst, Magyar Bírói Gyakorlat, Magánjog, 123. Jogi Hirlap Döntvénytára I. 216 referring to J.H. I, 1062 and II, 486.

[120] E.g., P. VI. 5850/1923, M.D. XVII. 83; and P. VI. 6202/1923, M.D. XVII. 101.

[121] Apparently under the influence of the attitude of the Austrian courts.

[122] While such holding is not a binding precedent for lower courts, the rule must be followed by the Curia itself until changed by a general decision of all sections of the court. See Szladits: 1 A Magyar Magánjog Vázlata, 32.

[123] P.H.T. 764. The proposed Civil Code of Hungary (submitted to the House of Representatives on March 1, 1928, which however has never been enacted) has the same provision (Article 1106).

[124] This rule was followed also in connection with obligations containing a gold-value clause, where the amount to be paid was established by the value of gold on the day of payment. P. VI. 1544/1924; M.D. XVII. 66.

[125] Law XXXVII ex 1875.

also in commercial cases in spite of the express provisions to the contrary in the Commercial Code.[126]

It is quite interesting to note that in order to achieve the same results changes were made in the opposite direction in the field of negotiable instruments. The Statute concerning Bills of Exchange,[127] a law enacted in 1876, provided that, if foreign money in a bill of exchange is to be converted into domestic money, conversion shall take place at the rate of exchange prevailing on the day before payment. The courts, until inflation set in, interpreted the "day before payment" to mean "day of maturity,"[128] and when later, *during* inflation, the term of the Commercial Code "rate prevailing on due date" was held to mean "day of payment," the courts returned to the literal interpretation of the Statute concerning Bills of Exchange.

This pattern of changes, as was seen in the preceding pages, was fairly similar in other European legal systems. The Hungarian experience, however, completes the picture by a reversal of the new rules in the 1930's. During this period, many currencies, including the dollar, were devalued, which the official quotations of the Hungarian National Bank reflected as a drop in the rate of these currencies. When the debtor was in default and conversion at the rate prevailing on the day of payment rather than on the due date implied a loss to the creditor, the courts returned to conversion at the rate of maturity[129]—in spite of the rule laid down by the Curia in 1923[130] and in spite of the fact that the Curia was not supposed to deviate from its own rule until the rule had been changed by a general decision of all sections of the Curia itself.[131]

Another very interesting feature of this period (1930's) was the application, in a long series of cases, of the rate prevailing at the time the contract was made. In Hungary, in the twenties, confidence in foreign money

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[126] P. VII. 448/1916; P. IV. 3744/1920.

[127] Law XXVII ex 1876, Article 37.

[128] See Iván Meznerits, A Pénztartozások Joga és a devizajog (1944), at 116 *et seq.* No primary sources could be found on this point at the place of writing.

[129] P. VII. 3789/1933; P. VII. 5004/1933; P. VII. 6109/1933; P. VII. 5957/1933; P. VII. 2198/1933; P. VII. 1209/1934; P. VII. 3386/1934; P. IV. 3172/1934; P. VII. 4127/1934; P. VI. 4380/1934; P. VII. 245/1935; P. VII. 1124/1935; P. VII. 2132/1935; P. IV. 195/1937; P. IV. 1325/1938. See also Meznerits, *op. cit.*, p. 116. He agrees with other writers that the change was justified in view of the changed economic situation and that compensation for damages caused by the delay of the debtor is in order, but deplores that the opinions, instead of admitting that the rate of due date is used in order to award damages, merely state that they apply Art. 336 of the Commercial Code (which—as has been seen—was overruled by decisions in the 1920's).

[130] *Supra*, note 123.

[131] *Supra*, note 122.

used to be higher than in domestic currency, and many contracts—bank deposits, insurance policies, rent agreements—stipulated the money of account in foreign currency, mainly in dollars. When the dollar was devalued, Hungarian courts re-interpreted these contracts: the parties, it was argued, in stipulating foreign money, merely wished to preserve the value of the obligation; they did not have an increase in value of the domestic money in mind; judgments were given for the domestic money actually deposited, loaned, etc., disregarding both the due date and the day of payment rules.[132] The due date rule, it was held,[133] can be applied only when, in the course of "normal" economic life, in the "free" exchange of foreign monies, there is the "usual and predictable" movement of rates; but when a money loses a considerable part of its value in the course of a fundamental change in economic life, or when—as in the case of the dollar—the value is decreased by foreign legislation, the provision contained in Article 326 of the Commercial Code cannot be applied! Similarly, the day of payment rule cannot be applied, it was held, because it was introduced in a period when the national currency was depreciating, "showing just the opposite general characteristics to those of the present."[134]

Uniform bill of exchange and check laws

Article 41 of the uniform law adopted by the Geneva Convention providing a Uniform Law for Bills of Exchange and Promissory Notes reads as follows:

"When a bill of exchange is payable in a currency which is not that of the place of payment, the sum payable may be paid in the currency of the country, according to its value on the date of maturity. If the debtor is in default, the holder may at his option demand that the amount of the bill be paid in the

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[132] *As to loans:* P. VII. 1014/1933; P. VII. 1440/1933; P. IV. 3753/1934; P. VII. 5545/1934; P. VII. 5903/1934; P. V. 279/1935; P. V. 4584/1935; P. VII. 620/1936; P. VII. 2570/1936; P. VII. 3829/1936; P. VII. 3932/1936; P. VII. 937/1937; P. V. 3506/1937; P. VII. 4194/1937; P. VII. 6271/1939; P. VII. 4170/1939; P. VII. 6161/1939.

As to contracts to sell: P. VII. 3302/1933; P. V. 4419/1933; P. VI. 4285/1935; P. VI. 1335/1935; P. VII. 5834/1935; P. VII. 6072/1936; P. V. 4426/1936; P. VII. 1447/1936; P. IV. 5589/1939. *Others:* P. VII. 367/1937; P. VII. 777/1937; P. VII. 2151/1938; P. VII. 4662/1938; P. V. 4421/1938; P. VII. 5721/1938; P. VII. 612/1939; P. VII. 4170/1939.

[133] See Meznerits, *op. cit.*, at p. 121.

[134] It is interesting to note, however, that in at least one case (P. VII. 5135/1936) where plaintiff, who deposited dollars with a Hungarian bank, was an American firm, the Curia did not give judgment at the (higher) rate prevailing at the date of the deposit. The court did not see an intent to hedge the pengö in this situation in choosing the dollar as the money of account since dollar was the depositor's national currency.

currency of the country according to the rate on the day of maturity or the day of payment.

"The usages of the place of payment determine the value of foreign currency. Nevertheless, the drawer may stipulate that the sum payable shall be calculated according to a rate expressed in the bill.

"The foregoing rules shall not apply to the case in which the drawer has stipulated that payment must be made in a certain specified currency (stipulation for effective payment in foreign currency).

"If the amount of the bill of exchange is specified in a currency having the same denomination, but a different value in the country of issue and the country of payment, reference is deemed to be made to the currency of the place of payment."[135]

Article 34 of the uniform law for checks contains practically identical provisions for the conversion of foreign money.[136]

The Uniform Bill of Exchange Law was adopted by the following countries:[137] Switzerland, Germany, Danzig, Austria, Italy, France, Netherland, Denmark, Greece, Poland, Portugal, Monaco, Japan, and Roumania (without ratification).

The Uniform Check Law was adopted by[138] Danzig, Denmark, Finland, France, Germany, Greece, Italy, Japan, Norway, Netherland, Poland, Roumania, Sweden, Switzerland.

This conversion rule, adopted by the Geneva Conference after considerable debate, seems to be the solution that more than any other protects the creditor against losses caused by adverse movement of exchange rates during the delay of debtors.[139]

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[135] League of Nations. Records of the International Conference for the Unification of Laws on Bills of Exchange, Promissory Notes and Cheques (Official No.: C. 360. M. 151. 1930. II) Geneva, November 28, 1930. The article quoted corresponds to, although is by no means identical with, Article 40 of the Uniform Regulations adopted by the Hague Conference of 1912.

[136] *Cf.* e.g., Hamel, Joseph and Ancel, Marc, "La Convention de Genève sur l'unification des chèques." Travaux et recherches de l'Institut de Droit Comparé de l' Université de Paris (1937).

[137] Compilation of Schnitzler, *op. cit.* (*supra*, note 37).

[138] Compilation of Hamel & Ancel, *op. cit.* (*supra*, note 136) 79.

[139] The Report of the Drafting Committee makes the following comments in connection with Art. 41 of the uniform bill of exchange law (*op. cit.* in note 135 *supra*, p. 140 *et seq.*):

". . . With regard to bills of exchange drawn payable in a currency which is not that of the place of payment, the Hague texts of 1910 and 1912 and most laws on bills of exchange lay down the main rule that, unless it has been expressly stipulated that payment shall be made in a given currency, the debtor may pay either in the foreign currency, or, if he prefers, in the currency of the place of payment. This principle, which is based on considerations of a practical order, has been retained in the present text.

"If payment is effected at maturity, this rule involves no difficulty. Generally speaking, the rate of exchange quoted on Exchange in the place of payment may be consulted to deter-

III. Comparative Summary

In summarizing the changes in conversion rules in the nine countries reviewed in this study, it should be borne in mind that the changes were prompted by economic forces that worked in opposite directions in various countries at different times. After World War I for instance, when the major changes took place, money of the United States, England, and Switzerland was firm compared to the money of the other countries; at the same time French, Belgian, and Italian money—which depreciated in comparison to the dollar, pound sterling, and Swiss franc—appreciated in terms of German, Austrian, and Hungarian money.

The first generalization that may be offered is that, with the exception of the rules of conversion of the uniform bill of exchange and check laws,[140] all rules surveyed provide for conversion on a particular date—date of maturity, date of judgment, date of payment, etc.

Second, we find that whenever a conversion rule was changed, it was changed in such direction as to protect the creditor against loss caused

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mine the value of the foreign currency on the date of maturity, or local custom may be followed.

"94. The problem becomes more difficult, however, if, as a result of delay on the part of the debtor, payment is only made at a later date, and if the exchange rate as between the foreign currency and the currency of the country has varied after maturity. One delegation proposed that the words 'when payment can be demanded,' be replaced by the phrase 'when payment is made.' It adduced the following argument in favour of its proposal: the holder would be detrimentally affected if the debtor, owing a specified sum in a stable currency, were entitled to meet his obligation by paying, in the currency of his own country, a sum which, converted at the current rate on the date of maturity, corresponded to the debt, but which in the meantime had so depreciated that the creditor, when converting into foreign currency, no longer obtained the original amount of the debt. On a majority vote the Conference rejected this proposal.

"95. The question, however, was again discussed, whether, as a set-off to the debtor's right to pay in the currency of his own country, some means could not be found of protecting the holder against a debtor who, in order to obtain undue profit at the expense of the holder, delays the payment of his debt. As a result of the discussion, it was proposed that the Conference should insert a stipulation to this effect in Article 41.

"96. If in such cases the debtor is still allowed to choose between payment in foreign currency or in the currency of the country, various legislative alternatives are possible as regards the rate that should govern payment. The legislator may also decide in favor of applying the rate current at the date of maturity, to the exclusion of that current at the date of effective payment. It may, however, be argued against this solution that if the foreign currency rate has fallen since the date of maturity, the debtor, who will naturally choose to pay in that currency, will, by delaying payment, realize a profit at the expense of the holder. But the debtor had the same possibility of making inequitable gain if the opposite solution is adopted, namely, that the foreign currency should be calculated according to the rate of exchange at the date of payment. If the rate of this currency has risen in the period between maturity and the date of payment, the debtor will certainly effect payment in the depreciated currency of the country.

"The only effective method which does not unduly favour the dilatory debtor is, it would seem, to deprive him, from the moment at which delay occurs, of his right to choose between the two currencies, and to allow the holder of the bill of exchange to demand that payment should be made in the currency of the place of payment, and also to allow the holder to choose between the rate current at the date of maturity and that current at the date of effective payment."

[140] *Supra*, p. 177 *et seq.*

by the delay in performance by the debtor: when the old rule provided for conversion at due date and the domestic money depreciated after due date, the conversion date was pushed forward in time as far as the particular legal system permitted (to day of judgment, day of actual payment);[141] when in turn the old rule provided for conversion at day of judgment or day of payment, and the domestic money increased in value in terms of foreign currencies, the date of conversion was pushed back to due date[142] and even to the date of contracting.[143] As a corollary, no change in the conversion rule was made although application of the rule in itself would have caused hardship to the creditor, when the legal system permitted separate compensation for the loss suffered by the creditor due to adverse movement of the exchange rate during the period between due date and date of payment.[144]

The changes in conversion rules were particularly spectacular where they occurred by way of "interpretation" in the teeth of express statutory provisions to the contrary.[145] The Belgian bill of exchange law provided for conversion on due date; in time of inflation this was interpreted by the courts to mean "day of payment."[146] The same interpretation was given under similar circumstances in Italy to the conversion rule of the old Civil Code and the former Commercial Code.[147] In Germany, the express provision of the Civil Code for conversion at day of payment was interpreted—before World War I—to mean due date, while during the inflation it was interpreted to mean what the Code actually said.[148] In Austria, during the inflation, the provision of the Commercial Code for conversion at "due date" was again interpreted to mean "day of payment."[149] In Hungary, before World War I, the day-of-payment rule of the bill of exchange law was interpreted to mean "day of maturity;"

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[141] In France, after erratic rules, the day of payment rule became predominant, *supra*, p. 163; Belgium, p. 167; Italy, p. 169; Germany, p. 172; Austria, p. 174; Hungary, p. 175.

[142] U.S.A. *supra*, p. 157; England (with less clarity), p. 160; Italy, p. 169; Germany, p. 171; Austria, p. 174; Hungary, p. 176.

[143] E.g., when the dollar was devalued in the 1930's: Germany (in noncommercial transactions), *supra*, p. 172; Hungary, p. 176.

[144] Switzerland, *supra*, p. 162; France, p. 166; Belgium, p. 167; Italy under the new Civil Code, p. 170; Germany after the inflation, p. 172.

[145] In the interpretation of dreams, contemporary theory ascribes a different meaning to the dream content than appears on the surface. Freud, Siegmund, The Interpretation of Dreams (1913), *passim*. The same approach, applied by courts to the interpretation of statutes, may lead to dangerous consequences.

[146] *Supra*, *p.* 167.

[147] *Supra*, p. 169.

[148] *Supra*, p. 172.

[149] *Supra*, p. 174.

during inflation a literal interpretation was adopted and, at the same time, the due-date rule of the Commercial Code was interpreted to mean "day of payment;" when in the 1930's some foreign currencies depreciated in terms of the pengö, the courts reverted to the day of maturity "interpretation."[150]

IV. Conclusions

The fact that so many countries have had so many rules of conversion, and furthermore, that within the countries the changes have been so frequent and the rules often not settled, of itself suggests that none of these rules have the force of some natural law.

One cannot, it is submitted, arrive at the one and only correct rule of conversion by logical legal analysis and argumentation, because conversion is not a necessary phenomenon in connection with foreign money obligations. There is no theoretical reason why a foreign money obligation should not live on as such until it is extinguished.[151] When a debtor performs by payment of foreign money in kind, there is no conversion. When judgment is rendered in foreign money, there is no conversion either,[152] and the original foreign money obligation, after it is merged into judgment, continues its life as foreign money in its second incarnation. Since there is no logical reason inherent in the nature of foreign money obligations at what particular turning-point in their existence—due date, date when suit was commenced, judgment day, day of payment, etc.—they should cease to exist as foreign money and become domestic money, the choice can be either the result of legal tradition or of expediency.

That the present rules of conversion, both in American courts and in the countries surveyed, are not the outgrowth of traditional development, it is believed, has been amply demonstrated; there have been changes back and forth along the lifeline of the foreign money obligation, and the present rules can be regarded as little "traditional" as those preceding. In America in particular, the "ancient," traditional conversion rules are not those applied at present.[153]

If expediency then is the basis of choice, the critique, after ascertaining what objectives are aimed at, and perhaps whether these are worthwhile objectives, will have to determine whether the rules established will actually bring about the desired results.

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[150] *Supra*, p. 176.

[151] *Cf.* Nussbaum, *op. cit.* p. 370; Mann, *op. cit.* p. 288.

[152] The foreign money obligation is turned into domestic money as the last step in execution if no foreign money of the debtor is attached.

[153] *Supra*, p. 158 *et seq.*

As has been seen, whenever changes were made in the law relating to conversion, the date of conversion was shifted forward or backward invariably in such fashion that the creditor should not suffer loss as a consequence of wrongful delay in performance by the debtor. When the domestic money appreciated in terms of foreign money, the date of conversion was pushed back to due date; when the domestic money depreciated, conversion was postponed until the latest date permitted by the legal system: judgment or day of payment. It would be difficult to argue against the propriety of such an aim.[154] The problem therefore boils down to the simple question whether any single conversion rule can possibly satisfy the requirement.

If the legal system permits the award of damages caused by the delay, the answer is in the affirmative, since any harmful result of the delay can be compensated and it makes comparatively little difference which day is chosen for conversion. For instance, it is most likely that, had the old Italian code not prohibited recovery of damages, the shifting of the conversion date would not have occurred; for this reason, it is probable that, under the new code, which allows damages caused by delay, the rule prescribing conversion on a fixed date (due date) will operate satisfactorily.

But if, as in the United States and England,[155] no compensation beyond interest can be awarded for the delay in payment of money, any single conversion rule will defeat the objective of protecting the creditor against a defaulting debtor: if the judgment-day rule is chosen, the creditor suffers a loss if the foreign money depreciates during the interval between maturity and judgment; conversely, if the domestic money depreciates during that period, the debtor will benefit at the expense of the creditor by the change in rate if the breach-day rule is applied.

It is a weak argument to counter this conclusion with the suggestion that, since the courts change the rule with the changing economic situa-

[154] The protection of the creditor against tardy debtors which has caused the constant shifts from one conversion rule to another, necessarily brings up sociological considerations and there may be visions of the hard-hearted judge backing up Shylock. Sociological considerations are not discussed in this study, but it might be remarked in passing that the debtor is not necessarily the "deserving poor" and the creditor the "idle rich." In the words of von Mises, "under capitalism the typical debtors are not the poor but the well-to-do owners of real estate, of firms, and of common stock, people who have borrowed from banks, saving banks, insurance companies, and bondholders. The typical creditors are not the rich but people of modest means who own bonds and savings accounts or have taken out insurance policies. If the common man supports anti-creditor measures, he does it because he ignores the fact that he himself is a creditor." Ludwig von Mises, The Theory of Money and Credit, (1953) 417.

[155] *Cf.* Nussbaum, *op. cit.*, p. 159 and the authorities there cited.

tion, the appropriate conversion rule will finally prevail in every period. First, it must be borne in mind that it takes considerable time before the rule is changed and the first cases which come up under the different situation will usually be decided under the old rule. Second, and this is just as important, the change may not involve a general trend of the domestic money, but only one particular foreign money. The domestic money may have a fairly constant value in terms of all foreign currencies except one, the one of the obligation, the only one which matters in the particular case under litigation, yet the court will not change its practice and the party will suffer injustice. Finally, the changes in the law are made when the changes in the value of currencies are drastic. But not only such individual rights deserve protection as are dramatically infringed. Many commercial transactions, for instance, are made on a small margin of profit; in such cases, while the movement of rates may not be wide enough to shock the court's conscience into changing the rule, it may still turn a profit into a loss, which is not justified.[156]

The logical conclusion is that, under a legal system which does not award damages for delayed performance of monetary obligations beyond interest, if protection of the creditor against the loss caused by delay in performance is sought,[157] this cannot be achieved by a rule providing for any particular date as the day of conversion; the only rule which will serve this purpose is the one which permits the court to apply either the rate of maturity or the last permissible day (day of judgment in Anglo-American law, day of payment in Continental systems) whichever is higher.

The final, most difficult, and undoubtedly the most important question, however, is whether this conclusion is a proposal *de lege ferenda*, or whether it *is* the law of the United States.

The courts of the United States, it seems, have never formulated the rule in such, or similar, wording. It may be argued, nevertheless, that in

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[156] *Cf.* Page v. Levenson, 281 F. 555 (D.C. Md. 1922); Sulka v. Brandt 154 Misc. 534; 277 N.Y.S. 421 (App. Term. 1935).

[157] This objective may not sound attractive to those who think exclusively in terms of the dollar: if in case of appreciation of the foreign money between due date and judgment day the debtor has to pay at the higher rate of the date of judgment, the creditor will have a windfall, it will be argued, since he gets more dollars than he would have received had the debtor performed on due date. But parties who have transactions involving foreign money obligations usually do not think, and deal, exclusively in terms of the national currency. When the creditor obtains dollars under a judgment, which is the only money he can get, he will as likely as not *procure the foreign money that was due to him in the first place.* If he obtains judgment at the rate prevailing on the day of breach, *he will not be in a position to procure the foreign money if the rate increased between due date and judgment day.*

a way, they have acted on it. There are ample precedents for both the breach-day rule[158] and the judgment-day rule;[159] the turn of the tide came at a time (after World War I) when the dollar appreciated in terms of foreign money, as is in accordance with the suggested formulation.[160] The repeated emphasis of some courts that the breach-day rule has no universal application without explaining the proviso,[161] leaves the door open to interpret the rule as applicable only when the facts are the same, namely, when the dollar is stable. It could well be argued, if there were an inflationary devaluation of the dollar, that the breach-day rule was evolved in cases where one of the facts was the stability of the dollar, a fact which was public knowledge and did not have to be pleaded, and that the breach-day rule should not apply when the fundamental facts are different. The argument could then be carried further to a situation where there is no *general* depreciation of the dollar, but only appreciation of a particular foreign currency, when the breach-day rule, established for the protection of the creditor, does not protect, but harm the creditor in case of the debtor's delay.[162]

The comparative study of changes in foreign jurisdictions supports this argument. The decisions of foreign courts are not precedents of the same force as judgments of American courts,[163] but they do demonstrate

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[158] *Supra*, p. 157.

[159] *Supra*, p. 158.

[160] *Supra*, p. 160.

[161] *Supra*, p. 157.

[162] The issue came up in A. Sulka & Co. v. Brandt (*supra*, note 156). Plaintiff sold goods to defendant in Paris, for a price expressed in French francs, and the rate of exchange for francs increased between due date and the date when judgment was rendered. The court held that "the judgment should have been based on the rate of exchange prevailing as of the date of the breach of contract, in the absence of special circumstances showing such rule to be inappropriate. . . . The mere circumstance that the fluctuation of exchange went against the plaintiff would not seem to justify a departure from this rule." In the light of the motivation that moved the courts to adopt the breach day rule in the first place, one is more inclined to agree with the lower court.

[163] It is significant to note, however, that in the field of monetary law American courts cite quite frequently foreign judgments. Without having completed a study of this phenomenon, only a few random examples are given here: Levy v. Cleveland C., C. & St. L. Ry. Co., 210 App. Div. 422, 206 N.Y.S. 261 (1924) cites as precedent the 1921 decision of the Court of Appeals of Brussels in Compagnie Générale pour l'Eclairage et Le Chauffage par le Gaz v. Société Magerman & others. In re Société Intercommunale Belge d'Electricité-Feist v. The Company, 49 Times Law Report 344 [1933] is cited in Irving Trust v. Hazlewood, 148 Misc. 456, 265, N.Y. Supp. 57 (1933). The English case, Société des Hotels le Touquet Paris Plage v. Cummings [1922] 1 K.B. 451 may be regarded as a leading case in America for the issue decided and was cited—among many others—in Die Deutsche Bank Filiale Nurnberg v. Humphry, 272 U.S. 517, 47 S. Ct. 166, 71 L. Ed. 383 (1926) or Transamerica v. Zunino, 82 N.Y.S. 2d 595 (Sup. Ct., 1948). Lord Mansfield's classical decision

the nature of foreign money obligations. They show that if a legal system —such as the American—endeavors to enforce such obligations unimpaired by adverse rate movements during the delay of the debtor, unless damages beyond interest can be awarded for the loss caused by the delay, the rules providing for conversion on any single specified day are abandoned when the explosive force of economic change—inflation or deflation—reveals the incongruity of the fixed-date conversion rule.

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in Miller v. Race, 1 Burr. Rep. 457 (K.B. 1758) was cited—again among many others—in Klauber v. Biggerstaff, 47 Wisc. 551, 3 N.W. 357 (1879).

Lenhoff, *op. cit.* (*supra*, note 106) p. 334, points out convincingly that due to the identical approach to the concept of money all over the civilized world, the problems arising in connection with monetary obligations are the same everywhere. In no other field of the law has the comparative study of law been so fruitful, maintains Lenhoff, as in the field of monetary obligations, due to the universality of the problems; similarly, in no other field have foreign rules of law gained such importance in the various domestic legal systems as in the domain of monetary obligations.

J. A. C. GRANT

Judicial Control of Legislation

A Comparative Study

WE KNOW THAT LIBERTY IS POSSIBLE today only under the rule of law. Indeed, to protect liberty the need for governmental intervention seems constantly to increase. But it is equally true that government and liberty may become competitors. We speak of the will of the majority, which must prevail; yet we believe also that minorities have rights that must be respected. Many countries, such as Austria, Australia, Canada, Germany, Mexico, Switzerland, and the United States have sought a partial solution in federalism, which seeks national uniformity only for matters that do not lend themselves to local diversity. Jalisco need not follow the same path as Morelos or Yucatán; California can give effect to its own ideas, even though they differ widely from those of Illinois or New York. But there also are minorities in Jalisco and Morelos, in California and New York, whose rights must be respected. It would be possible, of course, to divide the powers of government on an economic or social basis rather than on the basis of geographic units, but it would be necessary then to protect the rights of the minorities within the various trades, professions, syndicates, etc. Hence the practice, now standard, of including those rights considered basic and fundamental in written documents such as the Declaration of the Rights of Man and of the Citizen, the Bills of Rights of our own country, or the first 29 articles of the Constitution of Mexico. And alike from their nature and their position in a fundamental written law flows the doctrine that they occupy a high position in the hierarchy of laws.

The very concept of the rule of law implies a hierarchy of normative rules. The decrees and resolutions of administrative agencies must be in harmony with the statutes that provide for them. The by-laws of local governments must conform to the laws of the state or province, and those of the latter to the laws of the nation. Is it wise to add still another level of authority? Should laws conflicting with the constitution, including the individual guarantees set out in the latter, be regarded as void? And if so, who is to decide if conflict exists? At whose request? In what type

J. A. C. GRANT is Dean, Division of Social Sciences, University of California.

of proceeding? Upon whom should the defense of the statute fall? What are the legal effects of a ruling of unconstitutionality?

Although there are many important democratic countries in which an act of parliament is the ultimate legal authority, one may say that the more general practice is coming to be that the constitution prevails against an ordinary statute, and the question whether or not conflict exists is a judicial one. But there is little uniformity in the methods of applying this judicial control. There are notable differences as to:

1. *The court or courts involved.* Some, like the famous jurist Hans Kelsen in his Constitution of 1920 for the Republic of Austria, would restrict this function to a special tribunal (*Verfassungsgerichtshof*, or supreme constitutional court).[1] Others prefer to use the regular supreme court of justice, as in the case of Colombia and its popular action against statutes.[2] Mexico, with its action of *amparo*, uses all of the federal courts save the circuit courts,[3] and in our own country every judge, even though he be only a local justice of the peace, has not only the authority but the duty in his decisions to respect the constitution as a higher law than any statute, whether state or national.

2. *The proceeding.* Is it best to have a special form of action against the statute itself, as in Austria, Colombia, Cuba, and a few other countries? Or a special form of action but not against the statute, as in Mexico? Or should constitutional questions reach the courts only as subsidiary issues in ordinary litigation, as in our own country?

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[1] For a defense of the Austrian system see Hans Kelsen, "Rapport sur la garantie juridictionnelle de la constitution," Annuaire de l'Institut International de Droit Public (1929) 52, and "Judicial review of legislation," 4 Jour. of Politics (1942) 183; also C. Eisenmann, La Justice Constitutionnelle et la Haute Cour Constitutionnelle d'Autriche (1928). Article 163 of the Constitution of 1934 abolished this special court and transferred its functions to a senate of the regular supreme court, but the previous system was restored in 1945.

The leading example of the use of such a special court today is found in the German Federal Republic. This is coupled with the provision [Constitution of 1949, Art. 100 (1)]:

"If a court considers unconstitutional a law the validity of which is pertinent to its decision, proceedings are to be stayed, and a decision is to be obtained from the Land court competent for constitutional disputes if the matter concerns a violation of the Constitution of the Land, or from the Federal Constitutional Court (*Bundesverfassungsgericht*) if the matter concerns a violation of this Basic Law. This also applies if the matter concerns the violation of this Basic Law by Land law or the incompatibility of a Land law with a Federal law."

See A. T. von Mehren, "Constitutionalism in Germany—the first decision of the new Constitutional Court," 1 Am. J. C. L. (1952) 70. For similar methods of blocking off the trial courts from ruling on constitutional issues see Cuba, Chile, Uruguay, and the various states composing the German Federal Republic. And see the Spanish Constitution of 1931.

[2] The Colombian system is discussed below.

[3] The most complete discussion of the Mexican system still is S. Moreno, Tratado del Juicio de Amparo conforme a las Sentencias de los Tribunales Federales (1902).

3. *Who may raise the issue of constitutionality?* Should this be restricted to judges or other designated public officials, as Hans Kelsen has argued and as he provided in the Austrian constitution?[4] Anyone, even though he has no special interest at stake, as in Colombia? Or is it better to limit this right, as in Mexico and the United States, to those who suffer direct injuries from the statutes they wish to question?

4. *Who shall defend the statute against the charge of unconstitutionality?* And more especially: What rights shall the government have to defend the validity of its statute? How, if at all, may third parties, also affected by the statute, assert their claims as to its validity or invalidity? We may illustrate the two extremes by Colombia and its popular action, in which there are only two parties, the petitioner and the attorney-general, and the United States until 1937, where the only parties were the plaintiff and the defendant—the latter, like the former, generally a private person. Mexico, and the United States since 1937, occupy a middle ground.

5. — and here we have even less agreement—*What is the effect of a ruling of unconstitutionality?*

Many pages would be necessary to examine all of these questions and the diverse solutions that are offered in various parts of the world. But we may understand some of them better even if we do no more than examine two systems which are very different in their nature and functioning: (1) Colombia, with its petition of unconstitutionality brought against the statute itself, by any person—regardless of whether or not he alleges any immediate interest—directly in the Supreme Court, whose decision does not rule on the rights of a plaintiff against a defendant, but directly upon the validity of the statute, a ruling of unconstitutionality having the same effect as a repealing statute; and (2) the United States,

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[4] Dr. Kelsen originally anticipated that by permitting the national government to question the validity of provincial laws, and the provincial governments to question the validity of national laws, all questions of constitutionality would be raised promptly. Experience demonstrating that this was not so, a 1929 amendment permitted the regular supreme court or the administrative court, when a law which the judges considered of doubtful constitutionality was directly involved in a case before them, to refer the question of constitutionality to the supreme constitutional court. Of course such referrals usually grow out of requests made by counsel for the litigants. See J. A. C. Grant, "Judicial review of legislation under the Austrian Constitution of 1920," 28 Am. Pol. Sci. Rev. (1934) 670, and the articles by Kelsen cited above in note 1.

This amendment appears to have been modeled after the practice then used in Czechoslovakia. See M. Z. Peska, "Le développement de la constitution Tschécoslovaque," 47 Revue du Droit Public (1930) 224. In turn it served as a model for the German Constitution of 1949, but the Law on the Constitutional Court added a procedure (*Verfassungsbeschwerde*) by which a private person can obtain a decision from the Constitutional Court on certain constitutional questions. See 1 Am. J. C. L. (1952) 70, 76.

at the other extreme, without any special procedures, where the question of unconstitutionality can be raised only as a subordinate issue in a suit between party and party, and reaches the Supreme Court, if at all, only on appeal;[5] where, in fact, the ruling of the court is not on the validity or invalidity of the statute, but on the rights of the parties, the statute notwithstanding; and where the effect of a ruling of unconstitutionality, at least in legal theory, goes no further than to decide this specific case.

I start with the United States, not merely because its system has been the most widely copied, but also because many of the changes that have been made by other countries, including Colombia, have been adopted for the express purpose of evading the defects, real or hypothetical, of the American system.

United States of America

The system of our own country—which is nothing more than the absence of any special system—was the normal consequence of its political experience prior to independence while consisting of a group of English colonies governed under a system of written charters granted by the king. The terms and conditions of these colonial charters were treated by the courts as binding upon the colonial legislatures, and enforceable in the courts as "higher law" than colonial statutes. A colonial statute would be held void because in conflict with the charter, just as the by-law of a city or the act of a private corporation would be treated as a nullity because it exceeded the powers delegated to the city or to the corporation —in other words, because it was *ultra vires* of the acting body.[6] When these colonial charters were replaced, following independence, by constitutions, the established practice continued; the word "unconstitutional" replaced the phrase "*ultra vires*,"[7] but the nature of the proceeding and the basic theories remained the same. Hence it was not necessary to make any special provision in the Constitution for judicial control; if there is such provision, it is only that the Constitution is the supreme law of the land and that the statutes passed by Congress and by the state

[5] Of course the Supreme Court does have a narrow original jurisdiction under Article 3 of the Constitution, as it may try cases when a state or a foreign diplomat or consul is a party. However, even such cases normally are tried in the district courts. See United States v. California, 297 U.S. 179 (1936).

[6] See D. O. McGovney, "The British origins of judicial review of legislation," 93 Univ. of Pa. Rev. (1944) 1; J. H. Smith, Appeals to the Privy Council from the American Plantations (1950).

[7] The old phrase would do just as well today. Canada, for example, still prefers to use it.

legislatures are valid and hence enforceable only if they are in accord with the Constitution.[8]

The American doctrine, then, is based upon a single concept: a statute contrary to the Constitution is void. The unconstitutional law does not become unenforceable when it is declared unconstitutional by a court; it is void *ab initio*—from the beginning—and the court cannot apply it *because of* its nullity. It cannot serve as the basis of a demand because the one upon whom the demand is made can evade it by pleading the unconstitutionality of the statute. It cannot serve as a defense, since the plaintiff can defeat this defense by alleging its unconstitutionality. If its unconstitutionality is obvious—as is the case, for example, after the Supreme Court by a decisive vote has found it unconstitutional—rarely will the government attempt to enforce it, or private persons attempt to assert claims based upon it, since such efforts will not succeed. Although the statute remains upon the statute books unless and until repealed, in reality it is a dead letter.

A 1946 decision of the Supreme Court of Guatemala serves as well as any decision of any court of our own country to illustrate the American system. The case: *Salvador Marroquín Figueroa* contra *Marta Lainfiesta de Ubico*, on appeal.[9]

In 1936 Mrs. Ubico, the wife of the dictator, bought a farm from Mr. Marroquín F. for Q 4,000. In 1945 the latter filed a civil suit in a court of first instance, seeking to cancel the sale for lack of voluntary consent. Defense counsel conceded that if the sale was made under duress it was, under recognized principles of the Guatemalan codes, subject to cancellation; but he pointed out that the statute of limitations on such suits was four years, so that in the absence of proof that for some acceptable reason, such as intimidation of the petitioner or of the judges, the suit could not have been brought during this time, the right to sue had expired in 1940. The petitioner did not prove such intimidation, nor did he prove duress in the making of the original contract; instead, he offered evidence indicating that the farm had been worth slightly more in 1936 than the price received, and relied upon Law No. 173, enacted following the revolution of October 20, 1944, which read:

"Art. 1. Sales of real or personal property that have been effectuated by institutions of credit, by government agencies, or by private persons (during

[8] Article 6.

[9] The opinion of the Supreme Court appears in the *Gaceta de los Tribunales* [Guatemala] for 1946, p. 105, and in the *Diario de Centro América* for May 17, 1946, p. 535. I was permitted to study the records of the case in the archives of the trial court, the court of appeals, and the supreme court, and some of the facts and quotations given below are taken from these sources.

the administrations of General Jorge Ubico and of Federico Ponce Valdes) in favor of public functionaries or their relations within the fourth degree of consanguinity or the second of affinity, for less than their real value at the time of their alienation, even though made at public auction, shall be reputed fradulent and, in consequence, void.

"Art. 2. The statute of limitations on actions to which this law refers shall commence to run on the date this law takes effect."

Counsel for Mrs. Ubico attacked this statute, purporting to revive this cause of action against her nearly five years after it had expired, as an unconstitutional effort to disturb a right, vested under an executed contract, by special legislation "deliberately passed to despoil of their properties persons who are not acceptable to the current regime . . . illegally and unjustly" and in defiance of the constitutional mandate against retroactive legislation. He added, "Jesus in his omnipotence could raise Lazarus from the dead, but the present Congress with its statute cannot revive the perfected prescription because this is forbidden by the Constitution. . . . The judges are . . . obligated to declare in concrete cases the unconstitutionality of statutes that suffer such defects. . . . Every law passed contrary to a constitutional precept is a void law that is born dead, and no court may render a judgment based upon it."

It is clear that the question in this case was: Should the court cancel the sale of 1936? But it is equally clear that this turned upon a second question: Was Law No. 173 of 1945 constitutional? Both the trial court and the court of appeals found that it was constitutional, and so ruled in favor of the petitioner. But the majority of the Supreme Court, stating that "statutes have no retroactive effect according to Article 49 of the Constitution . . . , which prohibits disturbing rights acquired" pursuant to the then existing law, held it void and therefore sustained the defendant's plea of prescription.

The legislature had not repealed Law No. 173; the judgment could not repeal it, since the court's power, according to Article 170 of the Guatemalan Constitution, was solely to declare, upon giving judgment, that the law was not applicable because it was in conflict with the fundamental law. But it was equally clear to all prospective litigants that, so long at least as these judges composed the Supreme Court, it would be useless to rely upon this statute.

Defects. What are the principal defects of the American system that have led so many other countries to develop systems of judicial control that are so markedly different? Generally, four are specified.

1. As a Mexican author has expressed it,[10] it is not possible to assume

[10] R. L. Orantes, El Juicio de Amparo (1941) 53.

that the public interest in the defense of its statutes will always be cared for adequately by a private litigant. Suppose, for example, that in the suit of *Marroquín F.* against *Lainfiesta de Ubico* the petitioner had not desired to win, being a friend of the defendant who wished to help her secure a ruling from the highest court to the effect that the statute was unconstitutional. There have been such cases in the United States, and often they have concerned statutes of major importance. In 1895 the Supreme Court held that the national income tax act of the preceding year was unconstitutional in a suit brought by a stockholder against his corporation to enjoin the latter from paying the tax voluntarily.[11] And in the days of Franklin Delano Roosevelt and the New Deal, the decision against the validity of the Bituminous Coal Conservation Act was rendered in the case of *Carter v. Carter Coal Company*[12]—even the names of the parties serve to put us on guard. Other cases have been even more startling.[13]

The Judiciary Act of 1937[14] has largely cured this defect, at least so far as national statutes involved in litigation in federal courts are concerned. Copying the system long used in Mexico, this statute provides that when the validity of a national statute is called into question by a litigant the court must notify the Attorney General and permit him or his agent to become a party to the case. Indeed, the statute goes further than the Mexican practice, since the government may submit evidence, make motions, or appeal. We owe a real debt of gratitude to our neighbor for the idea embraced in this improvement. It is to be regretted that it took us so long to learn the lesson.

2. Another defect, inherent in our system, consists of the uncertainty resulting from the fact that normally decisions of the courts on constitutional questions will have retroactive effect. Consequently, in order to know the law of today one must be able to divine the decisions of tomorrow—or of several years hence.

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[11] Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895).

[12] 298 U.S. 238 (1936).

[13] See Fletcher v. Peck, 6 Cranch 87 (U.S. 1810); Buchanan v. Warley, 245 U.S. 60 (1917); United States v. Johnson, 319 U.S. 302 (1944).

[14] 28 U.S.C.A. sec. 2403. See "The Judiciary Act of 1937," 51 Harvard L. Rev. (1937) 148; "Revision of procedure in constitutional litigation: the act of 1937," 38 Columbia L. Rev. (1938) 153. The value of the new rule was demonstrated in United States v. Johnson, cited in the preceding note. The suit was brought to question the validity of the rent control sections of the Emergency Price Control Act of 1942, and the trial court held the statute unconstitutional. On appeal the judgment was vacated and the suit dismissed as collusive because the plaintiff was shown to have brought the suit in a fictitious name at the request of the defendant, who hired the plaintiff's attorney and paid all of his court costs. These facts would not have come to light had not the Attorney General, pursuant to the 1937 act, become a party to the case.

3. This uncertainty continues even after a decision adverse to a statute, or to another statute involving parallel issues, has been rendered: for the law remains on the statute roll as if it were "an actually living rule, so that every court retains its complete freedom to apply it or not,"[15] leading to needless appeals to the Supreme Court. In fact, the Supreme Court can change (and has changed) its opinion, and hold that a statute previously held void is in fact constitutional—and this decision likewise will have retroactive effect.[16]

4. As a Colombian writer has pointed out, the American system depends entirely upon the vicissitudes of litigation. Unless a constitutional issue can be and is raised in the course of a suit between party and party, a judicial ruling cannot be obtained upon it—a situation which, in his opinion, "violates the most elementary requirements of public morality."[17]

We may pass over the first of these charges, since the matter is easily rectified. Not so, however, in the case of the other three. If indeed they are defects, it is clear that such a compromise system as Mexico's action of *amparo* suffers equally from them. A writ of *amparo*, the Mexican law provides, "has as its object to restore the injured party to the enjoyment of the violated right."[18] And even after the Supreme Court has rendered the five successive uniform decisions on a given issue that are necessary to make its views binding upon the lower courts—a requirement that scarcely is necessary in Anglo-American courts with their doctrine of *stare decisis*—each individual decision, Article 107 of the Constitution provides, "shall be such as to concern itself only with private individuals, limiting itself to affording them redress and protection in the special case to which the complaint refers, without making any general declaration as to the law or act that led to the complaint." In other words, the statute remains on the statute roll—and not many years ago a leading Mexican attorney and professor of law argued at length that even the President could not treat the law that had been held unconstitutional as a nullity, but must continue to apply it, leaving the

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[15] The language is that of a Colombian scholar, H. Meyer L., "El control judicial de la constitucionalidad de las leyes," Revista Javeriana [Bogotá] No. 72 (1941) 71.

[16] As stated by the Supreme Court of the State of Alabama, "We are aware that . . . the statute declared above to be unconstitutional has been by this court held to be constitutional and valid in three several decisions . . . . We regret the necessity we are under to depart from the rulings of our predecessors. We regret it all the more because those several decisions have no doubt been relied on by the appellant as authorizing him to do the act for which he was convicted. The relief is not with us." Boyd v. State, 53 Ala. 601 at 608 (1875). But see footnote 38, below.

[17] See Meyer L., cited above in note 15.

[18] Ley de Amparo [México], Art. 80.

parties to their judicial remedies.[19] And in Mexico, as in our own country and others that have copied our system of judicial control, the action must be brought by a person whose private rights are being directly affected by enforcement of the law alleged to be unconstitutional.

In the light of these alleged defects, let us compare the system of judicial control used in Colombia; a system which frequently has been characterized as the best in the world, and which was consciously designed to evade these alleged defects of the American and Mexican systems of control.

Colombia

The popular action against statutes, which has been copied by Cuba, Haiti, and Venezuela, was born in Colombia in 1910. Previously, Colombia had had only a system of control that it had copied from Venezuela, providing that if the President vetoed a statute on constitutional grounds it should be referred to the Supreme Court for a ruling as to its validity, and should be promulgated as law only if the Court held it constitutional.[20] Its sponsor, Dr. Caro, predicted that under this system the enactment of unconstitutional laws would be virtually impossible, but in practice it has been found that most unconstitutional laws originate with the administration. Hence, the Constitutional Convention of 1910 expanded the Supreme Court's jurisdiction as follows:

> "Art. 41. To the Supreme Court of Justice is confided the guardianship of the integrity of the Constitution. Consequently, in addition to the powers conferred upon it . . . it shall have the following: To decide definitively as to the enforceability of bills that have been vetoed as unconstitutional by the Government, and of all laws and decrees accused before it by any citizen as unconstitutional, first hearing the Attorney General of the Nation."[21]

Under the new provision the Supreme Court, in a little over 40 years, has invalidated well over fifty national statutes in whole or in part. Many of these have been of major importance, and the range of rights

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[19] A. Martínez-Báez, "El indebido monopolio del poder judicial de la Federación para conocer la inconstitucionalidad de leyes," Revista de la Escuela Nacional de Jurisprudencia [México] No. 15 (1942) 250. Professor Martínez' conclusions were based in part upon a misunderstanding of the doctrine generally applied by the courts of our own country.

[20] See J. A. C. Grant, "El control de la constitucionalidad de las leyes a petición del ejecutivo previamente a la promulgación: la experiencia de Colombia," 1 Revista Mexicana de Derecho Público (1947) 243, republished in translation in 21 So. Calif. L. Rev. (1948) 154.

[21] In 1945 the Supreme Court was deprived of jurisdiction over actions against ordinary administrative decrees, which go to the *Consejo de Estado*, or administrative court. See Article 214 of the 1945 codification of the Constitution. As this paper is written steps are being taken looking toward the preparation of a new constitution, which may make other changes.

protected has been very wide. For example, statutes have been invalidated because they disturbed rights vested under executed or executory contracts[22] or under prior laws,[23] interfered with liberty of contract[24] or with freedom of speech,[25] took private property for public use without adequate compensation,[26] appropriated money for other than a proper governmental purpose,[27] or granted special privileges in defiance of the principle of equality before the law.[28] The provision, obviously, has played a major role in Colombian public life. For the first time in modern history, it was made possible for any person, regardless of any direct interest in the outcome save his interest in common with all others that the constitution be not violated, to bring an action directly against a statute itself in the court of last resort, whose decision settles the issue once and for all.[29]

The procedure is very simple and direct. The court has interpreted the word "citizen" very broadly to include juridical entities and even aliens. It is not even necessary to use stamped paper, which would add to the cost of the suit. The written petition requesting a ruling of unenforceability must contain three things: a literal copy of the provision or provisions alleged to be unconstitutional, specific reference to the constitutional provisions alleged to be violated, and the reasons that lead the petitioner to this conclusion. If it meets this test, the petition is sent immediately to the Attorney General, who must present his views (*vista*) in writing.

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[22] See J. A. C. Grant, " 'Contract clause' litigation in Colombia: a comparative study in judicial review," 42 Am. Pol. Sci. Rev. (1948) 1103.

[23] Decisions of Aug. 2, 1912, 22 Gaceta Judicial [Colombia] 2; June 6, 1916, 25 G. J. 49; May 17, 1921, 28 G. J. 305, and Sept. 30, 1921, 29 G. J. 17.

[24] Decisions of June 23, 1913, 23 G. J. 2, and April 24, 1922, 29 G. J. 125.

[25] Decision of Nov. 17, 1914, 23 G. J. 251.

[26] Decision of Nov. 4, 1927, 34 G. J. 113.

[27] The best cases on this point reached the Court through presidential vetoes. See the decisions of Nov. 3, 1911, 20 G. J. 142; Dec. 4, 1913, 22 G. J. 197, and Dec. 16, 1913, 22 G. J. 199. A somewhat similar problem was involved in the decision of Sept. 30, 1947, 65 G. J. 569, which was a popular action.

[28] Decisions of Sept. 10, 1920, 28 G. J. 65, and April 2, 1945, 59 G. J. 3. And see the decision of March 3, 1952, 71 G. J. 312, holding a statutory penalty unconstitutional because it bore so unevenly upon different classes of violators.

[29] The proceeding bears some resemblance to the indictment for unconstitutional legislation used in classical Athens, but more closely resembles the special procedure introduced into the law of our own State of New Jersey in 1873 to question the legality of a statute upon procedural grounds. See J. A. C. Grant, "New Jersey's 'popular action' *in rem* to control legislative procedure," 4 Rutgers L. Rev. (1950) 391. I have traced the Colombian background of the 1910 amendments in "Judicial control of the constitutionality of statutes and administrative legislation in Colombia: Nature and evolution of the present system," 23 So. Cal. L. Rev. (1950) 484.

Without further proceedings, the petition and the Attorney General's reply are referred to the justice to whom this particular case is assigned. He must study not only both of these documents, but any other points that strike him as important since the law now provides:

"If the Court at the time of decision finds that constitutional provisions or principles different from those invoked by the petition have been violated, or that those invoked have been violated for reasons distinct from those alleged by the petitioner, it shall be obligated to make the corresponding declaration of unconstitutionality."[30]

As soon as the justice has prepared his proposed ruling and opinion these are presented to the full court, which decides the case without a public hearing or oral argument.

The constitution provides that the ruling shall be *definitive*. This means that the sentence of unenforceability (*inexequibilidad*) has the effect of annuling the statute, which cannot longer be considered as in force. Correlatively, a ruling of validity also is definitive—even though someone else may desire to present arguments or reasons omitted in the first petition and overlooked by the Court. Possibly the reader, like myself, will be of opinion that it would be better to return to the former practice, under which the ruling was restricted to the arguments set out in the petition and was final only as to those arguments. The change, however, was made with full knowledge of the consequences.

The jurisprudence of the Court has established the doctrine that rulings of unenforceability (*inexequibilidad*) have an effect only as to the future, and are not retroactive. As the Court has stated:[31]

"If they had a retroactive effect and comprehended the annulling of the laws from their passage, no right would be firm, and social insecurity and anxiety would be permanent and greater every day."

For example: Law No. 87 of 1915, reducing government salaries and pensions, was held unconstitutional as to military pensions in a decision rendered June 6, 1916.[32] The Court stated, "Consequently the aforesaid provisions (reducing military pensions) shall cease to be applicable *as of the date of the present ruling*." Contrast the result under Article 80 of Mexico's *juicio de amparo:* "The decision . . . has as its object to restore the injured party to the enjoyment of the violated right"—and here this

[30] Law No. 96 of 1936, Art. 2.
[31] Decision of July 17, 1915, 23 G. J. 423.
[32] 25 G. J. 51.

was the right to receive the full amount of his pension, without the reductions provided in Law No. 87.

A second illustration must suffice.

The Constitution provides that no increase in the salaries or traveling allowances of members of Congress shall take effect until after the members of the session in which it is voted have completed their terms. Nevertheless, the Congress of 1926 ordered an immediate allowance to each member of 250 pesos per month as living expenses. The Court held that the constitutional provision applies to such an allowance, and consequently that the clause as to the effective date of the statute was unconstitutional;[33] but the ruling was made *after the term of this Congress had expired*, and consequently was of no effect whatever.

Of course, the ruling could have had value as a guide for future congresses; but if this was its purpose, it utterly failed to accomplish it. Immediate increases were voted by the legislature of 1933, which were held unconstitutional in a decision rendered February 28, 1935[34]—but this ruling was equally futile, since the session had closed a few weeks previously.

Law No. 7 of 1945, which provided that it should take effect upon its publication, increased the allowance for living expenses to 20 pesos per day. Almost immediately a petition was filed with the Supreme Court challenging its constitutionality, and the Attorney General notified the Court that in his opinion the clause as to its effective date was unconstitutional.[35] But in the meantime the members were receiving their 20 pesos per day, secure in the knowledge that even if the statute subsequently were held unconstitutional, it would not be necessary to repay these monies. As a member of the cabinet said to me, "The Congress was making a laughing stock of the Constitution."[36]

There is much in the Colombian system that I find attractive, and that merits study. But having read several hundred opinions of the Colombian Supreme Court, I can only conclude that there is much to say for the rival doctrine that a ruling on the constitutionality or unconstitutionality of a statute should be limited to questions raised by a party who has a

[33] Decision of Aug. 23, 1927, 34 G. J. 49.

[34] 41 G. J. 145.

[35] R. Escallón, Doctrinas de la Procuraduría General de la República en Materia Constitucional (1945) 226.

[36] Before this case could be—or at least before it was—decided, the Constitution was amended to authorize such an increase in expense allowances, and a new statute was passed setting the figure at 20 pesos per day. This statute was held valid. Decision of June 4, 1947, 63 G. J. 308. And see the decision of July 27, 1946, overlooked by the reporter but finally published in 69 G. J. 309, dismissing the case against the 1945 statute as moot.

direct interest in the outcome.[37] The proceedings are more alive and more assiduously contested, and the court is less apt to overlook significant issues. Many Colombians are coming to believe that the doctrine that a statute held unconstitutional is to be treated as having been void *ab initio* has more advantages than disadvantages, and one may venture the prediction that some day their Supreme Court will change its jurisprudence on this subject. For the Colombian Constitution (Article 215) also provides: "In all cases of incompatibility between the Constitution and a law, constitutional provisions shall be applied in preference," and under this article a system of judicial control in the regular courts in litigation between party and party is developing, as in the United States. And this system and the doctrine that an unconstitutional statute is to be treated as void *ab initio* are virtually inseparable.[38]

Perhaps the alleged defects of the latter system, discussed above, in reality are not defects, but advantages. It may be that they represent the price that must be paid for a system of judicial control that is alive, realistic, and effective.

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[37] It is not to be assumed from this that I am opposed to the use of advisory opinions, at least in the form in which they are handled by the Supreme Court of Canada. There is much to be said for Dr. Kelsen's theory that conflicting claims as to jurisdiction between the central and the state or provincial governments should be settled expeditiously in actions to which those governments are parties, and that such actions may well be tried in the highest court. This is, in practice, the way the Canadian advisory opinion works, but with two additional safeguards: "4. The Court shall have power to direct that any person interested, or, where there is a class of persons interested, any one or more persons as representatives of such class, shall be notified of the hearing . . . and . . . shall be entitled to be heard thereon. 5. The Court may, in its discretion, request any counsel to argue the case as to any interest which is affected and as to which counsel does not appear, and the reasonable expenses thereby occasioned may be paid by the Minister of Finance." Revised Statutes of Canada (1927), chapter 35, section 55.

Space does not suffice to discuss the Canadian system here, but any country contemplating a revision of its system of judicial control would do well to study the Canadian advisory opinion as furnishing a possible desirable supplement to whatever system of control it may adopt as its standard one.

[38] The doctrine is so harsh in its effect that the American courts are developing many rules to evade its strict application. See O. P. Field, The Effect of an Unconstitutional Statute (1936). For recent decisions of the United States Supreme Court, see Brinkerhoff-Faris Trust Co. v. Hill, 281 U.S. 673 (1930); Great Northern R. Co. v. Sunburst Oil Co., 287 U.S. 358 (1932); Landis v. North American Co., 299 U.S. 248 (1936).

A. V. LEVONTIN

Foreign Judgments and Foreign Status in Israel

THE ISRAEL LAW on recognition of foreign judgments is based upon the Common Law. Article 46 of the Palestine Order in Council, 1922, directs the local courts to apply the substance of the Common Law where local provisions do not extend or apply.

There are, however, modifications due, in some slight measure, to local statutes, to a greater extent, to the local intercommunal or inter-religious conflict of laws, and also to the rule that matters of personal status of a foreigner are to be governed by his national law, rather than by his domiciliary law. The present article will be concerned mainly with these modifications.

I

It is safe to assume that an Israeli tribunal will refuse to accord recognition to a foreign judgment *in personam* unless the tests of international jurisdiction[1] are met. It should, of course, make no difference in principle that an Israeli court would itself assume jurisdiction in some seven or eight cases in which the above-mentioned tests are not met. Such an assumption of jurisdiction should not, necessarily, prove futile; the judgment debtor may have property within the jurisdiction against which execution can issue, although, as understood by Blackburn J. in *Schibsby v. Westenholtz*,[2] it would be idle to expect foreign nations to respect judgments based upon jurisdiction thus unilaterally assumed.

The Israeli provisions on service out of the jurisdiction[3] are interpreted

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A. V. LEVONTIN is Lecturer in Law, Hebrew University of Jerusalem.

Note: In citing Israeli decisions, the following abbreviations are used:

A.L.R.: Annoted Law Reports (in English).
C.A.: Civil Appeal.
C.C.: Civil Case.
D.J.: Reports of District Court Judgments (Psakim Mehoziim, in Hebrew).
S.J.: Reports of Supreme Court Judgments (Psakim Elionim, in Hebrew).

[1] *Cf.* Emanuel v. Symon [1908] 1 K.B. 302; Buchanan v. Rucker (1808) 9 East 192; Schibsby v. Westenholtz (1870) L.R. 6 Q.B. 155.

[2] *Supra.*

[3] "Service out of the jurisdiction of a summons or notice of the summons may be allowed by the court whenever:—
a) the whole subject of the action is land situated within the jurisdiction; or

substantially like similar provisions of the Rules of the Supreme Court in England, and in particular any doubt existing under any one of the various heads is resolved, as a matter of construction, in favor of the foreign defendant, in order not to subject him to the expense and annoyance involved in defending a lawsuit away from home.[4]

Jurisdiction of a foreign court to render a judgment *quasi in rem*, which lays no personal obligation upon the defendant, will probably be respected if the court had at the time effective control over the *res*—along lines familiar to American lawyers from case such as *Pennoyer v. Neff*;[5] *Harris v. Balk*,[6] and *Feuchtwanger v. Central Hanover Bank & Trust Co.*[7] The distinct notion of a judgment *quasi in rem* is not as closely worked out in English as it is in American law, but English law does occasionally proceed by way of "reification" of obligations, thus according jurisdiction to the locus of the "situation" of the obligation.[8] There is no Israeli procedure for the application of local assets to the payment

b) any act, deed, will, contract, obligation, or liability affecting land situated within the jurisdiction is sought to be construed, rectified, set aside or enforced in the action; or
c) any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; or
d) the action is brought against the defendant to enforce, rescind, dissolve, annul or otherwise affect a contract or recover damages or other relief for or in respect of the breach of a contract—
  i) made within the jurisdiction, or
  ii) made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or
  iii) by its terms or by implication is to be governed by the law of Israel, or
  iv) is one brought against a defendant in respect of a breach committed within the jurisdiction, of a contract wherever made, even though such breach was preceded or accompanied by a breach out of the jurisdiction which rendered impossible the performance of the part of the contract which ought to have been performed within the jurisdiction, or
e) any injunction is sought as to any thing to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof, or
f) any person out of the jurisdiction is a necessary or a proper party to an action properly brought against some other person duly served within the jurisdiction, or
g) the action is founded upon an act or omission committed with the jurisdiction."

Civil Procedure Rules, 1938, R. 48; Magistrates' Courts Procedure Rules, 1940, R. 34. *Cf.* for the English provisions, Ord. XI, r. 1.

[4] Wottitz v. Sborovitz and "Hawak" Ltd., C.A. 107/42, II 42 A.L.R. 523, applying the rule laid down by Farwell, L.J. in The Hagen [1908] P. 189, 201.

[5] (1878) 95 U. S. 714. And, in general, Restatement of the Law of Judgments, General Principles, and §3.

[6] (1904) 198 U. S. 215.

[7] (1942) 288 N. Y. 342.

[8] *Cf.* N. Y. Life Insurance Co. v. Public Trustee [1924] 2 Ch. 101. It is perhaps curious to note that the law is not entirely consistent on this matter. Thus, a foreign discharge in bankruptcy is not effective unless it is a discharge under the proper law of the obligation, Gibbs v. Société Industrielle et Commerciale des Métaux [1890] 25 Q.B.D. 399. Why should not a plea that the debt was "forcibly seized" and handed over to the trustee in bankruptcy be available to a bankrupt, just as it is available to a garnishee? And *cf.* Kleinworth, etc. v. Ungarische etc. [1939] 2 K.B. 678.

of debts, apart from the issue of personal judgment against the debtor, except, of course, where the property in question is specifically charged, as in the case of mortgaged land. A garnishment, such as in *Harris v. Balk*,[9] could be obtained in Israel but would be subsequently discharged unless a proper personal action could be instituted against the debtor, in which action the garnishment should be "confirmed." It could not otherwise mature into a final judgment.

Two recent statutes seem, however, to mark the introduction of *quasi in rem* procedure on a modest scale. One is the Absentee Property Law, 1950, and the other is the Germans' Property Law, 1950. It is provided by these statutes that a declaration may be obtained from a court as to the existence of a debt owing from one of a class of persons absent from the country but owning property therein, and then the Custodian, in whom such property is vested, must satisfy the debt to the extent of property in his hands. Since such a proceeding lays no personal obligation upon the absentee debtor, it is no objection that he is not amenable to personal service out of the jurisdiction.[10]

Foreign judgments strictly *in rem*, such as admiralty condemnation decrees, are rather rarely encountered. There is no reason to doubt that, as in Anglo-American law, jurisdiction to pronounce such decrees will be respected if the foreign tribunal had effective control over the *res*.

II

Where Israeli law materially differs from Anglo-American law, is, it is submitted, in its rules on recognition of foreign status decrees. This problem is closely linked to that of recognition of foreign status as such, apart from any judicial decree.

We may assume, along with Anglo-American law, that a decree as to status (at least a constitutive, as distinct from a merely declaratory decree) demands effective control of the status, not merely temporary control of the person whose status is in question. This status is conceived of as being moored to the *locus domicilii*.[11] International jurisdiction is thus exclusively conferred upon the *forum domicilii*, with the

[9] (1904) 198 U. S. 215.

[10] Klinger Bank v. Basal & others, C.C. Ha. 227/50, 3 D.J. 408. It is interesting to observe, as a matter of comparative jurisprudence, that the quantum of proof generally required to establish the existence of the debt is not mere "preponderance of probability," as in an ordinary civil action, but the high quantum ("beyond reasonable doubt") required in criminal proceedings. This is so in view of the absentee's nonparticipation in the proceedings.

[11] See in particular Salvesen or Von Lorang v. Administrator of Austrian Property [1927] A. C. 641; Haddock v. Haddock (1906) 201 U. S. 562; Williams v. North Carolina I (1942) 317 U. S. 287.

addition at most of a forum whose decree the *forum domicilii* chooses to recognize.[12] English and American law appear to be substantially agreed on the above rule except, of course, that current doctrine in the United States does not, in all cases, bar the wife from having a domicile separate from that of her husband,—hence American recognition of decrees granted to either of the spouses alone at the place of his or her domicile. On the other hand, England persists in her tenacious adherence to the doctrine of unity of domicile,[13] and it would seem that the recent statute[14] conferring upon the English court jurisdiction to entertain, in some cases, the petition of a wife "notwithstanding that the husband is not domiciled in England" (thus departing from the old established rule) has no bearing upon the English conception of *international* jurisdiction, i.e., an English court would probably still refuse to recognise a *foreign* decree based upon a similar statute. (The relaxation in *internal* competence may, however, result in time in modification of the rule of *international* jurisdiction.[15])

It will be observed that insistence upon sole jurisdiction of the *forum domicilii* is not unrelated to the application of the *lex domicilii*. Considering the telling modification which the old English rule underwent at the hands of *Armitage v. A.G.*,[16] one may, perhaps, be pardoned in formulating the rule thus: On the question whether a person is married or single, we accept the lead of the law of his domicile, whether or not the question depends upon a judicial decree. This is so because Anglo-American law considers a person's link to his domicile as his most potent single "ligature." It considers the community of a person's domicile as the one most intimately concerned with his status and with the legal, social, and economic consequences flowing therefrom.

It is precisely this approach which casts grave doubts on the glib assumption that the law of Israel is on this point one with Anglo-American law. By article 64 of the Palestine Order in Council:

"(i) . . . matters of personal status affecting foreigners . . . . shall be decided by the District Courts, which shall apply the personal law of the parties concerned . . . .

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[12] Armitage v. A.G. [1906] P. 135.

[13] See, in particular, A. G. for Alberta v. Cook, [1926] A. C. 444 (Privy Council).

[14] Matrimonial Causes Act, 1950, s. 18.

[15] The consideration of the somewhat ill-defined limits within which parties who have taken the benefit of a decree are estopped from contesting it; or within which parties who have actually litigated jurisdiction are barred from re-opening the issue on grounds of *res judicata*, falls outside the scope of this article. *Cf.* Davis v. Davis (1938) 305 U. S. 32; and generally, Angel v. Bullington (1947) 330 U. S. 183.

[16] [1906] P. 135.

"(ii) The personal law of the foreigner concerned shall be the law of his nationality unless that law imports the law of his domicile, in which case the latter shall be applied."

From this it would seem to follow that in Israel the question whether a particular foreigner is married or single must be answered as it would be by his *lex patriae*. Our verdict is as closely homologous as can be to that of the law of his nationality. Hence, if the foreign verdict is based on a decree rendered upon jurisdiction deemed insufficient by an Israeli court, but deemed sufficient by the *lex patriae*, such verdict must be recognized. In other words, jurisdiction to pronounce a status decree relating to a foreigner must be tested by the law of his nationality, not by Israeli notions of private international law. Thus, the question whether a particular foreigner is to be recognised as divorced on the strength of a decree issued by a court of his domicile cannot be answered *simpliciter*. The answer would differ with the content of his national law on this matter.

It is submitted that on at least one occasion the Supreme Court of Israel has misconceived the position. In *Kaba v. Saikaly*[17], H and W were foreigners, Syrian nationals, but locally domiciled, ordinarily resident at Haifa. An ecclesiastical court at Haifa refused H's action for judicial separation, holding it had no competence in the matter.[18] H then went to Damascus, Syria, where he succeeded in obtaining a decree of divorce in the Syrian courts. Subsequently, in proceedings brought by W in the District Court (a civil court of general jurisdiction) of Haifa, H pleaded his Syrian divorce as a defence to W's claims, but the District Court refused to recognise his divorce and issued a judgment of judicial separation, awarding W alimony. The Supreme Court upheld the District Court decision, saying: "It seems to me inconceivable that paragraph (ii) (i.e., paragraph (ii) of article 64, quoted above) should be interpreted so as to allow the appellant (H) completely to override the provision of Article 64 of the Order in Council and himself to decide the jurisdiction by resorting to a court in a different territory altogether."

It should be observed that the Syrian decree is not rejected on any grounds (such as violation of natural justice, fraud) except lack of jurisdiction. Its rejection is open to criticism on two grounds: First, in view of the fact that Israeli law ordains the ultimate rule of the *lex patriae*

[17] C.A. 189/45, 46 A.L.R. 270.

[18] Under the regime of the Order in Council, the ecclesiastical court could only have jurisdiction over W, a foreigner, with her consent. Otherwise the matter is triable before the general civil courts.

in matters of personal status affecting a foreigner, it should also allow jurisdiction to the *forum patriae*, or to any other forum recognised by the *forum patriae*, just as the Common Law, which ordains the ultimate applicability of the *lex domicilii*, allows jurisdiction to the *forum domicilii* or to any other forum recognised thereby. Secondly, regardless of the Israeli view on jurisdiction, it is enough that there was jurisdiction under the Syrian law. It seems to be clear that, if a question were to be put to the law of Syria respecting the status of H, a Syrian national who had obtained a Syrian divorce, the law of Syria would answer: "He is single." Hence, under Article 64 of the Order in Council, a court in Israel should answer likewise. There is no reason, and it is also unjust, officious, and disorderly, to out-Syria Syria in the matter of its own nationals. Moreover, there seems to be no substance in distinguishing between the law of Syria and a Syrian judgment. Such distinction would assume the following shape: "We in Israel are entitled to make up our own minds on what the law of Syria is, not being bound by the decision of a Syrian Court." This position would, of course, be wrong if Syrian law applied the doctrine of *stare decisis*, whereunder a decision, whether "right" or "wrong," is a source of law. The position might be correct if Syrian law had not been governed by *stare decisis*, in which case it might be appropriate to consider expert testimony as to the likelihood, or otherwise, of the decision being on later occasions followed in Syria. In any event, the above considerations do not arise in the present case. We are not here considering *a* Syrian decision, but rather *the* decision of the status of this particular man. The relevant principle here is not *stare decisis* but *res judicata*. It is sufficient for our purpose that a Syrian court would say of *this man*, holding a Syrian divorce decree, that he is single. If this is what every Syrian court would say, then this is also the verdict of Syrian *law* on the personal status of the husband. In view of this, it is submitted that the courts of Israel should not have ignored the Syrian decree; that, in view of the imperative wording of Article 64 (ii) of the Order in Council, they were indeed bound to give effect to the Syrian decree. It should, of course, be noted that H has in no sense sneaked out of the jurisdiction; he went from a foreign state into his home state.[19] It is very probable that the Supreme Court was influenced in its decision by the English rule of domiciliary, rather than national, jurisdiction—a rule not applicable in Israel.

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[19] Since Israeli law makes the husband's personal status depend upon the law of his nationality, even though he was domiciled at Haifa, it is fair to describe Syria as his home state.

III

Against the background of general borrowing from English law, it appears natural for Israeli courts to treat Article 64 (ii) as an inconvenient exception to the Common Law rule which gives preference to the law of the domicile. Article 64 (ii), however, is more than a mild nuisance: it is a deliberate and far-reaching departure from the Common Law rule and a deliberate adoption of the Continental rule. It is much too simple to argue[20] that English law must be applied, subject only to the modification of reading "nationality" for "domicile." Preferring the national to the domiciliary law brings about several results unlike those in the Common Law:

(a) Every person has a domicile, but not every person has a nationality; (b) every person has only one domicile, but some people have more than one nationality; (c) in English law a married couple has a single domicile, but husband and wife may have between them two or more different nationalities; (d) whether a person has his domicile in country X is determined by the *lex fori* not by the law of country X,[21] but whether a person has the nationality of country X, only the law of that country, not the *lex fori*, can answer;[22] (e) a person's nationality can be changed by his own formal acts, not so his domicil. From this point of view nationality is more "subjective," domicile more "objective;" a person cannot be domiciled somewhere on his own say-so. Moreover, an Israeli court can hardly ever be placed where it has to choose between the application of an otherwise applicable law and the recognition of a foreign judgment based on a "wrong" law. A good illustration of such a choice is furnished by the decision of Henn Collins, J. in *Galene v. Galene*.[23] Petitioner, a Frenchman domiciled in France, civilly married Mlle. Galice, a Frenchwoman (domicil not reported), at Paddington Registry Office, in London. Subsequently, a nullity decree of this marriage was obtained from a French Court, the marriage "being contrary to French law by reason (*inter alia*) of its being clandestine, and without the consent of the parents of either party, and moreover the marriage not being recorded in the register of Civil Status in France." Petitioner now moves the English High Court for a decree of nullity, basing himself on the French decree. Decree granted.

It will be observed that had petitioner approached the English High

[20] As in Skornik v. Skornik, C.C. 685/50, 5 D.J. 51 at p. 58.

[21] Re Annesley [1926] Ch. 692.

[22] Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, Art. 1.

[23] [1939] P. 237 (undefended).

Court in the first place there might have been a different decision. Petitioner relies on defects of form. *But they are not defects of form under the lex loci celebrationis, viz. English law.* By English private international law alone, apart from the effect of the French decree, petitioner would not seem entitled to a decree of nullity. But the general rule yields to the "principle laid down in *Salvesen, otherwise Lorang v. Austrian Property Administrator* [1927] A.C. 641 namely, that a judgment by the competent court of domicile, (is a) "judgment *in rem* which must be recognized and enforced by this court, unless it were obtained by fraud, collusion or other unlawful means. . . "[24]

It is submitted that a conflict such as here faced Henn Collins, J. cannot beset an Israeli judge. The statutory norm bidding him to answer the question as the law of the nationality would answer it is superior to the norm requiring recognition of foreign judgments. Recognition of foreign judgments is part of the Common Law and is therefore introduced into Israel only where local law does not extend or apply. Even then it must be introduced "so far only as the circumstances of Israel and its inhabitants. . . permit, and subject to such qualification as local circumstances render necessary."[25] It is at once evident (a) that local law, viz., Art. 64 (ii), does extend and apply to the question of solving the personal status of a foreigner; and (b) that the Common Law rules on conflict of laws can only be introduced into Israel subject to the qualification required by the local rule adopting the *lex patriae* in preference to the *lex domicilii*.

IV

A thornier problem is posed by the recognition of foreign status of foreigners who have become naturalized in the country, or who have shed their former nationality without acquiring local citizenship, *i.e.*, who have become stateless.

As already mentioned, the law applicable to matters of personal status of a foreigner is the law of his nationality. In the case of a *citizen*, however, Article 47 of the Order in Council ordains exercise of jurisdiction "according to the personal law applicable." The "personal law applicable" does not appear to have been statutorily defined. However, an uninterrupted line of authority, as well as the Ottoman tradition existing at the date of enactment of the Order in Council, firmly fixes upon the *religious law* of the person in question as his personal law, at

[24] Counsel for petitioner, *arguendo*.
[25] Palestine Order-in-Council 1922, Art. 46.

least for all persons who embrace a recognized faith. Thus, it has been held[26] that the personal law of a Jew who is not a foreigner[27] is Jewish religious (rabbinical) law, even if he is not formally a member of the established Jewish Community.[28] In sum, the personal law of a foreigner is his national law, while the personal law of a citizen (or of a stateless person) is his religious law.

It follows that a party's personal law changes upon naturalization, and the question is raised of the impact of the newly applied religious law on purely civil status acquired under the former national law. The question is one of intertemporal, as well as of international (or inter-religious) law. Is a vested status respected? Is status to be adjudged as of the time of its vesting?[29] A judge's sworn duty is to administer justice according to law as far as the law extends, otherwise to administer justice apart from positive law, perhaps guided by natural law. Now the positive law of the country tells us that "The personal law of the foreigner concerned shall be the law of his nationality. . . " It is arguable that this provision is, by its own terms, totally irrelevant to a person who is not (any longer) a foreigner. If so, the law applicable is the new religious law, and it is for this new religious law to pronounce, according to its own rules, on the continued subsistence of the formerly acquired status, or else on its dissolution or nonrecognition. Again, the reverse is arguable: in respect of the "foreign phase" and acts, events, and rights occurring or accruing thereunder, the national law continues to apply.[30] The silence which the Order in Council keeps on the intertemporal issue renders both arguments more or less equally acceptable. We should thus, it is submitted, prefer that interpretation which is conducive to justice. In general, justice would seem to lean against the retroactive bastardizing of children born in lawful wedlock, against declaring an erstwhile lawful wife to be (or even to have been) a mistress.[31]

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[26] C.A. 195/43, 43 A.L.R. 395; C.A. 122/44, 45 A.L.R. 75; C.A. 71/44, A.L.R. 460.

[27] If he is a foreigner, his *lex patriae* applies.

[28] The courts have not yet had occasion to consider which personal law is applicable to (say) a Jew or a Greek Orthodox who by a deliberate and formal declaration disavows his religious association, without embracing any other recognized faith.

[29] See G. Tedeschi, Studies in Israel Law (in Hebrew. Jerusalem, 1952) 136–139.

[30] Skornik v. Skornik (*supra*, n. 20,) at 55 (and *cf.* at 58).

[31] We could echo the words of Arminjon who, despite his coolness towards the doctrine of vested rights, says nevertheless with regard to status:

"Dans le passé, les actes accomplis en vertu de la loi ancienne sont maintenus. Pour déterminer la loi applicable au mariage, au divorce . . . il faut, d'après l'opinion généralement admise, se placer au moment où l'acte a été conclu. . . . C'est ainsi que les époux restent mariés en dépit des empêchements dirimants établis par la nouvelle loi." (Quoted in Tedeschi, *op. cit.*, 137.)

This general desideratum is, of course, subject to any rule of positive law. It is, moreover, capable on occasion of producing injustice, in which latter case it ought to be abandoned, unless enjoined by positive law. Let us follow the above propositions in a few local cases.

In *Neussihin v. Neussihin*,[32] W married H at Wiesbaden in Germany, in 1924, according to Jewish religious law only. The parties later moved to Palestine and obtained from the Rabbinical Court of Tel Aviv a certificate declaring the validity of their married state. Later they were naturalized. When H died, the validity of W's claim to her widow's share of his estate was contested by the other heirs on the ground of the alleged voidness of their marriage, the marriage not having complied with the formal requirements of the *lex loci celebrationis*, i.e., German civil law. It was held that, since at the time of H's death W was a non-foreigner Jewess, Jewish law applied to determine her status. Hence, as stated in the rabbinical certificate, she was H's widow and entitled to share in the distribution of his estate. It will be observed that the effect in this case of the recognition of the rabbinical certificate was to treat as married a couple not married under the *lex loci celebrationis*—in express derogation of the general rule.[33] A marriage was saved, certainly in accordance with W's wishes and presumably also in accordance with H's wishes. Would justice have required this solution against the wishes of one or of both of the parties? Would the position have been as clear had there been no issue of the 1924 marriage and in case one of the parties or both should have (re)-married, perhaps bringing issue into the world? Should we not sometimes be as interested in saving a celibacy?[34]

In *Tennenbaum v. Tennenbaum*,[35] the complicated facts may be summarized as follows: In 1940 Ursula, then a German Jewess, and Joseph, then a Czechoslovak Jew, married each other. This marriage was void because Joseph's prior divorce from a former wife had not been adequate under his Czechoslovak *lex patriae*. A little later Joseph was naturalized and then redivorced his former wife. He was now decidedly rid of her; his personal law was now Jewish and under it he was validly

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[32] C.A. 158/37, 37 A.L.R. 391.

[33] It is submitted that the validity—even formal—of marriage in Israel is *not* governed by the *lex loci celebrationis*, but by the national law in the case of foreigners, and by the religious law in other cases.

[34] The parties' nationality at the time of their marriage in 1924 is not stated in the reports. It may be that their *lex patriae* deemed the purely Jewish marriage sufficient. If so, the Rabbinical certificate was really otiose, as the German *lex loci celebrationis* is irrelevant.

[35] C.A. 234/45, 46 A.L.R. 337.

divorced.[36] In 1941 Joseph and Ursula obtained from the Rabbinical Court of Tel Aviv a fresh certificate of marriage, after having gone through a "reenactment"[37] of their 1940 marriage. It was held that, although the 1940 marriage was a nullity when celebrated, an authoritative and *bona fide* certificate that the parties are married in Jewish law must be accepted. Hence the "second marriage" (i.e., the certificate) is good, and therefore Ursula is not entitled to a declaration of nullity of her marriage to Joseph.

The net result of the *Tennenbaum* decision is, again, to apply Jewish law to a marriage not subject to it when celebrated. In this case too a marriage was "saved," in this instance against the wishes of one of the parties. (It must, however, be noted that the fresh certificate was in this case too issued to both parties pursuant to their joint request. Is not Ursula therefore simply estopped as against Joseph after having "led him to the altar"?)

In *Skornik v. Skornik*,[38] H and W, both Jewish, were married in 1948 in Poland at the registrar's. This marriage was good according to Polish law. It was a complete nullity in Jewish law. In 1950 they came to settle in Israel and renounced their Polish citizenship. It is clear that thereupon Jewish law became applicable to them, as to all nonforeign Jews in Israel. In the present action, before the Tel Aviv District Court (a civil court), W claims from H, inter alia, maintenance. Is she his wife? Held, she is: "Polish law governs as to occurrences during the Polish phase; Jewish law governs as to occurrences during the Israeli phase. Jewish law is not at liberty to reopen transactions carried out and to control a status acquired during the Polish phase, because the Private International Law of Israel does not seek the opinion of Jewish law as to the validity of status acquired in Poland."[39]

The last-quoted words neatly raise the conflict between secular and religious law. What if H had obtained a rabbinical certificate declaring him a single man? According to the present judgment the answer would be that our law "does not seek the opinion of Jewish law in respect of the Polish phase."

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[36] He was, indeed validly divorced under Jewish law the first time. Jewish law was not, however, then his personal law.

[37] "Ha'amadah:" a modern remarriage device in Jewish law. The better view seems to reject it completely as a ceremony. A husband and wife who are in fact already married cannot, while the marriage subsists, be remarried. Hence the first is the only and the decisive marriage by Jewish law. If the civil law chooses, for any reason, not to recognize it, there seems to be nothing left that Jewish law can do.

[38] C.C. (T.-A.) 695/50, 5 D.J. 51 (affirmed on appeal, C.A. 191/51).

[39] *Ibid.*, 58.

What would a rabbinical court have said had the question been presented to it?[40] The answer is wrapped in the truly ecclesiastical conception which slights mere territorial frontiers. In the eye of religious law there is no retroactivity whatever, as H and W were both Jewish in 1948, when they contracted their sinful union. They were already then acting defiantly in contravention of the one and only law applicable to them from a rabbi's point of view. There was therefore no marriage, regardless of what any secular authority might say.

And there still is no marriage in the eye of Jewish—as distinct from Israeli—law. It is this consideration which prompts us to doubt whether it is in all cases just to save a marriage even in the teeth of public opinion and religious authority at the parties' new home. Despite the District Court judgment, the rabbis in the future may refuse to marry issue of H and W on ground of bastardy and would, on the contrary, not hesitate to marry either H or W to a third person. Ultimately, the law of one country cannot speak with two voices on one and the same matter. It may, perhaps be suggested that H's undoubted moral duty to provide for W may be grounded in implied contract, or in specific legislation, without resorting to the "pious perjury" involved in declaring them married.

We may conclude with a hypothetical case which will illustrate how far, even in matters of status, respect for vested rights is an instrument for achieving justice and not an end to be indiscriminately pursued for its own sake. Let us suppose that H and W, both native French Catholics, are married in France at the registrar's only, such marriage being adequate by French law. Children are born. After a number of years H and W move to Ruritania and are naturalized there. By the law of Ruritania, a marriage celebrated only civilly is an absolute nullity, even when celebrated abroad by naturalized Ruritanians, and prior to their naturalization. The parties are looked upon, for all intents and purposes, as if no marriage had ever taken place. H and W and their children remain Ruritanian. A civil court in Israel is called upon to pronounce on their marriage, say incidentally, in a matter of succession. The parties being foreigners, their *lex patriae* applies. But which, French or Ruritanian? On the *Skornik*[41] reasoning, as well as on Arminjon's,[42]

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[40] The question is important. Under a Law passed by the Knesset (the Israeli parliament) in August 1953, matters of marriage and divorce of Jews in Israel, who are citizens of the State or resident therein, are within the exclusive jurisdiction of Rabbinical Courts. Henceforth a civil court will not be able to pass on the validity of marriage of such persons except, perhaps, incidentally to some other matter of litigation.

[41] *Supra*, n. 20.

[42] *Supra*, n. 31.

we should say French law governs the "French phase," hence "les époux restent mariés." However, is there any point in our saying so *in defiance of their present sovereign?* Ordinarily this question is not raised so violently. Very convincing evidence will be required to prove that the law of Ruritania has chosen to be as unreasonable as that. Nevertheless, if the evidence is forthcoming, we shall be entitled to say "Our hands have not shed this blood." To contradict Ruritania on the status of her own nationals is officious and not even just, as it may lead Ruritanians into conflict with their own law. Ordinarily, we assume that there is no objection from the Ruritanian side to the upholding of status acquired in pre-Ruritanian times. We thus apply French law actually through a hidden *renvoi* from Ruritanian law, i.e., we ultimately accept the view of Ruritanian law. *We* can afford to indulge our natural inclination to cherish vested interests only if the applicable law does so. Now if an analogy can be detected between the application of Jewish law and that of the law of Ruritania in the hypothetical case, then it is submitted that to the extent of the analogy doubt is cast upon the admissibility of the *Skornik* technique.

JOSEF L. KUNZ

Contemporary Latin-American Philosophy of Law

A Survey[1]

I

WHILE THERE HAS BEEN GREAT INTEREST in philosophy of law in Latin America at all times, it is only since about 1920 that a tendency toward original achievements can be observed. Philosophy and philosophy of law in Latin America has always followed Continental-European thinking, although the countries of leading influence have changed. During the colonial period, Catholic natural law and the influence of Spain prevailed. From the early days of the Latin-American independence movement, Spanish influence was replaced by that of France; French influence dominated all Latin America in all cultural fields from the end of the eighteenth century. It took in philosophy and philosophy of law the form of the French rationalistic natural law, the "droit de la raison," particularly of Rousseau. But Latin-American philosophy and philosophy of law followed, although somewhat tardily, the rhythm of Continental-European thinking, in the reaction against the long predominance of the "law of reason." This reaction—again under the leadership of France,—took the form of the philosophy of positivism. In some countries, this influence became operative by the middle of the nineteenth century; but in all countries the period from 1875 to 1925 is the period of the predominance of Auguste Comte.

JOSEF L. KUNZ is Professor of Law, University of Toledo, College of Law.

[1] These pages, written at the invitation of the editor of this Journal, are intended to give to American jurists a brief survey of contemporary Latin-American philosophy of law, a subject on which this writer has made a long and pioneering investigation. This was made in 1942–1948, in order to prepare, as a member of the Committee on Twentieth Century Legal Philosophy Series, the third volume of this Series, Latin-American Legal Philosophy, with an Introduction by Josef L. Kunz. (Harvard University Press. 1948). A more complete account was given in Josef L. Kunz: Latin-American Philosophy of Law in the Twentieth Century. New York. 1950, published also, somewhat enlarged in content, as La Filosofia del Derecho Latino-Americano en el Siglo XX, in 1951 at Buenos Aires, in the Spanish translation by Luis Recaséns-Siches. Naturally, for a full discussion, for details and bibliographies this writer must refer to his book; on the other hand, material will be mentioned which is not yet contained in his book, either because of more recent studies, particularly in connection with his Latin-American travels since 1949 or because of new developments in these last years.

Comte's positivism and hostility to metaphysics, his insistence on "ordre et progrès" dominated in all countries and, particularly in Mexico and Brazil, not only philosophy and jurisprudence, sociology and education, but even politics and religion. Mexico's politics was under the spell of Comte's positivism until the outbreak of the Mexican Revolution in 1911. Comte's ideas inspired the Reform of Benito Juárez and the long rule of the Dictator-President General Porfirio Diaz. In Brazil there was even an attempt to introduce a "positivistic Apostolate," replacing Catholicism with Comte's "Religion of Humanity." Comte's ideas inspired the Republican Party and were the determining factor in the end of the Brazilian monarchy. To the present day, the Brazilian national flag carries the Comtist inscription: "Ordem e progresso."

During this whole period 1875 to 1925, all Latin-American philosophy of law was sociological jurisprudence, strictly antimetaphysical, an often crude biological, ethnographical, evolutionary jurisprudence. Apart from Comte and his followers, the principal influences came from Herbert Spencer's theory of evolution, from Darwin and Haeckel, from W. Wundt, from the Italian "*scuola positiva*," from the German "ethnographical school of jurisprudence" (H. Post) and, particularly in Brazil, from the teleological jurisprudence of Jhering.

While works of sociological jurisprudence—sometimes only repetitions of European works—were produced all over Latin America, the outstanding work in Spanish America was written by the Argentinian Carlos Octavio Bunge, who, strongly under the influence of Gumplowicz, identified law with force. His book was read for many, many years by all Argentinian law students and determined the philosophical attitude of the Buenos Aires Law School.

It was in Brazil that sociological jurisprudence was strongest and has lasted longest. The juridical school of Comte's positivism was in the North, the "School of Recife." There is a chain of Brazilian sociological philosophers of law, from Tobias Barreto (1839–1889), the great Clovis Bevilacqua (1859–1944), drafter of the Brazilian Civil Code, to Sylvio Romero and, at the beginning of this century, Pedro Lessa. Since Barreto until the present day, it has been characteristic of Brazilian philosophy of law that a strong influence came from German thinking, particularly Jhering. But the philosophy of Kant also played a great role already in Barreto and, more so, in Sylvio Romero, who had, indeed, the ambition of founding a "critical realism" by the combination of Spencer's evolutionism with Kant's theory of cognition.

Even this sketch indicates that Latin-American philosophy and philosophy of law have been—and that is true also today—very different

from what is being done in the United States. Latin-American thinking in these fields has little connection with English and American philosophy. Although Latin-Americans today study the philosophies of James, Dewey, Whitehead, American "behaviorism," although they mention with respect Holmes, Cardozo, and Roscoe Pound and endeavor to familiarize themselves with North-American thinking through Spanish translations,[2] they follow Continental-European thinking, whether Spanish, French, or—now—German and Austrian. Latin-America is overwhelmingly Catholic; its law is based on Roman Law; hence, not only the contents of the law, but also the method of approach of the jurists is entirely different. It is exactly for these reasons that some familiarity with Latin-American developments should be useful for North-American lawyers, because these developments present new facets, somewhat neglected in this country. In a continent of two cultures, Anglo-Saxon and Hispanic, comparative study in the field of law is not only of great practical importance, but also rewarding, as these two great cultures are not only different, but also complementary.

II

It is against the background of the long predominance of Comte's positivism and, hence, of what Roscoe Pound calls "early" sociological jurisprudence, that contemporary Latin-American philosophy of law since 1920 must be understood. For it is today dominated by the reaction against positivism. The trichotomy of presentday jurisprudence into sociological, analytical, and natural-law or, in more modern terms, axiological jurisprudence, appears also in contemporary Latin-American philosophy of law. It will be convenient to follow these three forms of jurisprudence in this survey.

The long influence of Comte and of sociological jurisprudence has, in a certain way, continued. Even after 1920 books of this type were still published in Spanish America, as by the Bolivian Ignacio Prudencio Bustillo or the Paraguayan Cecilio Báez. But such books are only remnants in contemporary Spanish America of a gone past in remote countries and in no way characteristic of contemporary Spanish-American philosophy of law.

The situation is different in Brazil, where, notwithstanding the emergence of more modern forms of thinking, sociological jurisprudence has remained dominant to the present day. That is exactly why a gulf separates contemporary Brazilian from contemporary Spanish-American

[2] See El actual pensamiento jurídico Norteamericano. Buenos Aires. 1951.

philosophy of law. At the same time, Brazilian jurisprudence is nearer to the United States, where also, notwithstanding a school of natural law, whether Neo-Thomistic or not, and many great analytical theoreticians of law, sociological jurisprudence dominates. True, modern Brazilian sociological jurisprudence is neither that of Pound nor of the "Realist School," but represents what Pound calls the "stage of unification." It is interesting to see that Brazilians, strongly influenced by German thinking, turn to German philosophers and philosophers of law who are also highly influential in the United States, but more or less ignore those German and Austrian philosophers and philosophers of law, who dominate contemporary Spanish-American jurisprudence, but who exercise relatively little influence in the United States.

Of the many contemporary Brazilian sociological philosophers of law, five names are outstanding. There is Ivan Lins, who has written much[3] and is, so to speak, the most orthodox continuator of the Comtist tradition in Brazil. But, in recent studies, he seems to favor a combination of all three branches of jurisprudence and, thus, to be inclined toward an "integral" philosophy of law. There is Eusebio de Queiroz Lima, strictly antimetaphysical, strongly under the influence of Spencer and Léon Duguit.

The most original figure is, no doubt, Francisco Pontes de Miranda. Law, he tells us, must be studied in the realities, as a fact among facts. A science of law which would be a science must be a natural science like physics or chemistry. It must start from the theory of evolution and must study facts through the methods of observation, induction, and experimentation. The object of the science of law is not norms, but facts. Law is not a product of culture, but a quality of nature like life; it has its roots in biological necessities. His two volumes of philosophy of law abound in quotations in the most technical language from all fields of natural sciences, in geometrical figures, diagrams of physics and highly complicated formulas of higher mathematics, outdoing by far the style of the late W. W. Cook. He is inspired by scientists and mathematicians. He, too, looks for inspiration, first of all, to Germany; apart from scientists from Helmholtz to Planck and Einstein, he is influenced by the same German sociological philosophers of law, such as Eugen Ehrlich, Heck,

[3] A more complete list of his writings includes:

Ivan Lins, Catolicos e positivistas. Rio de Janeiro, 1937; Tomas Morus e a Utopia, 1938; A concepção do direito a da felicidade perante a moral positiva, 1939; Escolas Filosoficas. Second Edition 1944. Also, going beyond our book of 1950, we should mention Octavio Alecrim, Fundamentos do standard jurídico. A individualização judiciaria dos direitos. Rio de Janeiro, 1941; Tecnica, principios e codigos, 1952.

Kantorowicz, Wurzel, who are also highly influential in the United States.

Two names, not yet mentioned in this writer's book, have to be added. There is an important philosopher of law in Carlos Campos,[4] a sociological thinker, under the influence of the French sociological school and of Karl Mannheim. He seeks to show the factors which determine the interpretation of statutes by the courts and comes to the conclusion that all juridical theories are merely techniques to satisfy the interests of men and are, therefore, a product of the general social situation in a given epoch.

There is also a revival of the old sociological school in the North of Brazil, so that the phrase of "*A Nova Scola do Recife*" has been coined. The leading representative is Pinto Ferreira.[5] A great admirer of Pontes de Miranda, he is influenced by German scientists (Einstein, Schroedinger, Heisenberg), by psychoanalysis, by behaviorism, semantics, by the Neo-Positivism of the "Vienna Circle" (Carnap) and by sociological thinkers such as Max Weber, Heller, Duguit, Laski, Gurvitch, Timasheff and Sorokin. Relations with North-American thinking are not lacking; the author quotes with particular approval Arnold's "The Symbols of Government." For him the fundamental principles of a scientific jurisprudence are: monism, evolutionism, determinism. The destiny of mankind leads, according to the author, to a democratic, Christian socialism. In lyrical terms he praises the "universal, fraternal, solidary, pacifist, Christian message against all superstitions and feudal ideas, against all the old established myths." His socialism is "love for the neighbor, solidarism, liberty, Christianity;" it is culture, it ennobles, it leads to a more dignified life, to equitable distribution of riches, to equal opportunity for all, to a more decent and beautiful life for all mankind, and to peace. His motto is Comte's formula, but preceded by the word "peace:" *paz, ordem e progresso.*

III

It is only natural that in Latin America, overwhelmingly Catholic, Catholic natural law should always have had great importance. Even during the period of the predominance of Comte, that was true. The influence of the philosophy of the German Krause, who inspired the vogue of "*el Krausismo español*" in the Spain of the nineteenth century, made itself felt in Latin America through Krause's disciple Ahrens.

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[4] Hermeneútica tradicional y derecho científico, 1932: Sociologia e Filosofia do Direito.

[5] Introdução a Filosofia Científica. 1951; Principios Gerais do Direito Constitucional Moderno. Second Edition, 2 volumes. Rio de Janeiro, 1951. Pp. 831.

In contemporary Latin America we see—as in Europe and the United States—a strong revival of natural law philosophy, whether Neo-Thomistic or not. Neo-Thomism, on the strict lines of the "*philosophia perennis*" of St. Thomas of Aquinas, came into being in the whole Catholic world in consequence of the Encyclical "*Aeterni Patris*" of Leo XIII. Leading European Neo-Thomistic thinkers are highly influential in Latin America. But, apart from Neo-Thomism there is, in Latin America as elsewhere, a general revival of natural law and thinking. And modern natural law, in Latin America and the rest of the countries of Occidental culture, has many strong connections with modern philosophy and philosophy of law; with the Neo-Kantian Schools of Baden and Marburg; with all "intuitionist" philosophies; Bergson, phenomenology, theory of values, existentialism. Husserl and, particularly Scheler and Hartmann are highly valued also by modern Neo-Thomists. Existentialism, not in the atheist form of Heidegger and Sartre, but in the Christian form, e.g. of Jaspers and Gabriel Marcel finds a ready echo also in Neo-Thomists. In all these respects Spanish influence has again been of great importance. Spanish Neo-Thomists, like Miguel Sancho Izquierdo, Mendizábal y Martín, Enrique Luño Peña, Spanish writers on the French Institutionalist School,[6] Joaquin Ruiz Giménez,[7] Spanish Catholic existentialists, like Juan Zaragueta, P. Iturióz, Francisco Elias de Tejada Spinola, professor of philosophy of law at the University of Sevilla, wield influence in Latin America.

Even in Brazil, where Comtism was strongest and has lasted longest and where Catholicism in the nineteenth century suffered a period of decadence, there is a revival of Catholic faith and philosophy. The turning point came with Farias Brito (1862–1917), a highly interesting philosopher who is more and more studied.[8] His work in Catholic philosophy of law, has been continued by his disciple, Jackson de Figuereida and today by Alceu de Amoros Lima, who writes under the pseudonym of Tristão de Athayde. We must also mention the professor of Roman Law at the São Paulo Law School, de Correia, who has dedicated many years to a Portuguese translation of the "*Summa Theologiae*" of St. Thomas.

[6] To this School a forthcoming volume of the XX Century Legal Philosophy Series will be dedicated (Hauriou, Renard, Delos).

[7] La concepcion institucional del derecho. Madrid, 1944; Derecho y vida humana, 1944; Introducción elemental a la filosofia jurídica cristiana, 1945. See Antonio Truyol y Serra, La situación filosófica actual y la idea de la filosofia perenne. Madrid, 1948.

[8] See Teofilo Cavalcanti, "A filosofia jurídica de Farias Brito" (Revista Brasileira de Filosofia, Vol. III no. 2 (1953), Pp. 225–241, and the two studies, translated into Portuguese, by the above named Spaniard Tejada Spinola, "Raimundo de Farias Brito na filosofia do Brazil" (Revista Portuguesa de Filosofia, Vol. VI no. 3, Braga (1950) and As doutrinas politicas de Farias Brito. São Paulo, 1952.

A new and interesting Brazilian philosopher of law has appeared in the person of Miguel Reale, professor of jurisprudence in the São Paulo Law School, successor of Pedro Lessa. He stands for "cultural realism;" to him law is an integration of social elements in a normative order of values. Reale has done much for the growth of philosophy and philosophy of law in Brazil. He, together with his assistant, Renato Cirell Czerna, edits and directs the interesting "*Revista Brasileira de Filosofia*;" he convoked the First Brazilian Congress of Philosophy at São Paulo in 1950[9] and is now preparing the International Congress of Philosophy which will be held in the Summer of 1954, as a part of the festival on account of the fourth centenary of the foundation of São Paulo. In addition to his many earlier works, he has just published the first two volumes of his work on philosophy of law,[10] in which, according to his above-quoted formula, he develops a "philosophy of law in three dimensions," i.e. an "integral" philosophy of law.

There are writers on Catholic natural law in all Spanish-American countries, including Argentina (Ismael Quiles, S. J. Alfredo Fragueiro, Manuel Rio) and Mexico—the central figure is Oswaldo Robles—, notwithstanding the rather strong tension between State and Church during some phases of the Mexican Revolution.

The two outstanding Neo-Thomist philosophers of law in contemporary Spanish America are, in this writer's judgment, the Colombian Cayetano Betancour[11] and the Mexican Rafael Preciado Hernández. Betancour's work is symptomatic for modern Neo-Thomism. He sees in phenomenology a return to the ancient doctrine of Scholasticism and is a fervent admirer of Max Scheler. He has also great merits as the director of the excellent Colombian philosophical Review, "*Ideas y Valores*."

Preciado Hernández' work, perhaps the most important Neo-Thomistic philosophy of law in contemporary Latin America, is, although strictly Thomistic in an orthodox way, nevertheless a thoroughly modern work. It is modern in the restriction of the contents of natural law, in its opposition to the "Codes" of the Law of Nature of the eighteenth century, in its insistence on the absolute necessity of positive law, in its denial of any rivalry between positive and natural law, in its inclination toward an "integral" philosophy of law, in its recognition of the basically ethical character of the so-called natural law. That "natural law" is ethics, not

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[9] Anais do Primero Congresso Brasileiro de Filosofia. 2 Vols. São Paulo, 1950.

[10] Miguel Reale, Filosofia do Direito. First Part. 2 Vols. (Pp. 647). São Paulo, 1953.

[11] He has recently also published an Introduction to the Science of Law (Cayetano Betancour, Introducción a la ciencia del derecho. Bogotá, 1953. Pp. 366).

law, is the solution of this controversy which has lasted for over two thousand years, a solution, hinted at by the Spaniard Luis Legaz y Lacambra, by the German Coing and openly pronounced by the Neo-Thomist theoretician of law of the "School of Louvain," Jean Dabin, who states in clear terms:[12] "*Au binôme: droit naturel—droit positif il faut substituer celui de: morale—droit.*"

IV

But it is neither the survival of sociological jurisprudence nor modern natural law which characterizes contemporary Spanish-American philosophy of law. The latter is characterized by new philosophical tendencies, stemming from Germany and Austria. These new tendencies make themselves felt also in Brazil, where Euyalo Canabrava is the philosophical exponent of the philosophical "new humanism" and where the influence of Kelsen is strongly growing.[13]

The new philosophical tendencies mean a reaction against the long predominance of Comte's positivism. In Spanish America, the crisis of positivistic-pragmatist thinking is overcome. Naturally, Spanish-American philosophy of law is in close contact with Spanish-American general philosophy. But both follow again the rhythm of Continental-European thinking, only that the long French influence has given way to German-Austrian influence. The new trends mean a reaction against positivism in two directions: Neo-Kantianism, and the philosophies of the "phenomenological movement." In turning Spanish America to these new tendencies, Spain has been instrumental, where José Ortega y Gasset, eager—to quote his own words—to enrich the spirit of Spain with the stream of German intellectual treasures, founded in 1922 the "*Revista de Occidente*" and inspired Spanish translations of the works of the leading German and Austrian thinkers, making them, thus, available to Spanish America.

In philosophy and philosophy of law, there is in contemporary Spanish America a wish, after centuries of imitation of Europe, to "emancipate" Spanish America also philosophically, to create a true, Spanish-American philosophy and philosophy of law, i.e. one which is at the same time

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[12] Jean Dabin, Théorie Générale du Droit. Second ed. Brussels, 1953. Pp. 324. The text of the first edition is presented in English translation in Vol. IV of the XX Century Legal Philosophy Series.

[13] In addition to the older Brazilian Reviews and the above-quoted Brazilian Review of Philosophy, see, particularly, the Revista da Facultade de Direito, Universidade de São Paulo and the Revista da Facultade de Direito, Universidade de Minaes Gerais (Belo Horizonte, Brazil).

original and really Latin-American. Alejandro Korn started the critique of positivism and introduced Kant into Argentina. His successor, Francisco Romero, the most important philosopher in presentday Argentina, is a leading representative of the "new humanism." Mexico has attained great importance in the realm of philosophy. Apart from many others, the name of Antonio Caso is outstanding. Spain has made a great contribution to Mexico's contemporary philosophy also in a second way: through the fact that many outstanding Spanish philosophers and philosophers of law settled, in consequence of the Spanish Civil War, in Mexico.

In Caso's philosophical development we see the whole development of recent German-Austrian philosophy reflected in one life. Educated in the philosophy of positivism, it was he who destroyed the rule of Comte's positivism in Mexico. He fought against it with the arguments of Marburg Neo-Kantianism. But soon he underwent the influence of the European reaction against the Marburg School and took an anti-intellectual, intuitionist stand, which carried him via Bergson, via Husserl's eidetic and Scheler's emotional intuition to the modern existentialist theory of life, or "new humanism."

V

Contemporary Spanish-American jurisprudence followed the same development in two stages, although at first somewhat tardily. The Kant Renaissance started in Germany by 1870, but reached Spanish America only at the end of the First World War.

The first great influence came from the Marburg School of Neo-Kantianism, which emphasized the logical and the methodological. The influence came from the leading philosophers Cohen, Natorp, Cassirer, and from the powerful German Neo-Kantian jurisprudence. The greatest influence was wielded by Rudolf Stammler, the "renovator of philosophy of law." His influence was great in all Spanish-American countries. The distinguished Argentine philosopher of law, Enrique Martínez Paz of the Law School at Córdoba, not only introduced Stammler into Argentina and wrote much about him, but is also in his own philosophy of law essentially an adherent of Stammler. The latter's strong stand against Comtist positivism, his theory of the "pure forms of legal thinking," his insistence on the abstract and formal, on the a priori, on the logical side, climaxing in his search for the definition of law, were counterbalanced by his second principal topic, the "idea of law." This topic looked towards justice, toward a "natural law with variable content;" this part of his

doctrine explains why Stammler has been highly valued also by Neo-Thomists.

Of the Italian "*scuola neo-critica*," the Italian branch of German Neo-Kantian jurisprudence, the most influential philosopher of law in Spanish America is Giorgio Del Vecchio.

But even the Baden Neo-Kantian School, which emphasized the ethical rather than the logical and created the "philosophy of culture," had deep repercussions in Spanish America. It was introduced into Mexico by Francisco Larroyo, who has built up his own Neo-Kantian school in Mexico. Here again it was not only the leading philosophers, Rickert and Windelband, but the philosophers of law connected with this school —Lask, Muench, Gustav Radbruch[14]—who exercised great influence.

At the present time, the greatest influence over contemporary Spanish-American jurisprudence is wielded by the "Pure Theory of Law" of Hans Kelsen, whose works are continuously translated into Spanish, both in Spain and Latin America. His influence is so dominating that contemporary Spanish-American philosophers of law may be divided into orthodox followers of Kelsen, critical followers, and anti-Kelsenians. His followers abound in Spanish America.[15] But even so orthodox a follower of Kelsen as the Cuban Bustamante y Montoro asks in the preface of his work, whether we of this generation can accept Kelsen's dictum that law can have any content whatsoever and holds that the restoration of natural law is inevitable in the philosophy, as distinguished from the theory of law. This trend to accept Kelsen's theory of law, but to go beyond it philosophically, to combine the "Pure Theory of Law" with some elements of the philosophies of the "phenomenological movement" is, indeed, so to speak, the motto of contemporary Spanish-American jurisprudence.

VI

This particular situation is a consequence of the fact that Spanish-American philosophy and philosophy of law, has, in its second stage, again followed the rhythm of German-Austrian thinking. Only in Mexico there

[14] The principal works of Lask and Radbruch are presented in English translation in Vol. IV of the XX Century Legal Philosophy Series.

[15] To quote just a few names: Arnulfo Fernández Llano, Emilio Fernández Camus, A. de Bustamante y Montoro in Cuba. Rafael García Rosquellas in Bolivia (see his work, Basas para una teoría integral del derecho. Sucre, 1944) Rafael Rojina Villegas, Juan Manuel Terán Mata (published recently, Filosofía del derecho. Mexico City. 1952 Pp. 370) and the fanatical Kelsen-follower Guillermo Hector Rodríguez in Mexico. Kelsen's influence is also clearly seen in Eduardo Nieto Arteta, Eduardo García Maynez, Luis Recaséns Siches, Carlos Cossio.

exists a sharp split between the Neo-Kantians and the adherents of the different schools of the "phenomenological movement." The head of the Baden School in Mexico, Francisco Larroyo, strongly condemns all the philosophies of the "phenomenological movement." Guillermo Hector Rodríguez, head of the Marburg Neo-Kantian School in Mexico, is a most fanatical adherent of Kant, Cohen, and Kelsen, an implacable foe of Neo-Thomism, who has nothing but scorn and sarcasm for the newer "irrationalist, intuitionist" philosophies, which are, according to him, nothing but a revival of the mysticism of Plotinus or, like existentialism, "mere journalism."

Yet, overwhelmingly in contemporary Spanish-America, the philosophies of the "phenomenological movement" have been received as a reaction against the predominance of the logical, formal, methodological element in the Marburg School. Contrary to Neo-Kantianism, the philosophies of the "phenomenological movement" reached Spanish America quickly, and many Spanish Americans, who went to Europe to study personally with the leading thinkers, became their apostles in their native countries. All Spanish-American juridical, philosophical, and general reviews abound in articles on these philosophies, and many books dealing with them are published.[16] But whereas Neo-Kantian philosophy has also inspired a vigorous Neo-Kantian jurisprudence in Germany and Italy, no really important phenomenological jurisprudence, notwithstanding different attempts, has come into being in Europe.

The philosophies dominating contemporary Spanish-American jurisprudence, are Husserl's phenomenology, Scheler's and Hartmann's theory of objective values, the "philosophy of culture," the philosophy of Dilthey and existentialism, mostly in the form of Heidegger and Ortega y Gasset. Of Husserl's phenomenology contemporary Spanish-American jurisprudence has taken over only a few things: the idea of "essences," the phenomenological method of intellectual, "eidetic" intuition, by which the essences can be apprehended, and, in order to find the place of law in the general sphere of objects, Husserl's idea of "regional ontologies."

Scheler, although adopting Husserl's phenomenology, has, in his theory of objective values, followed paths entirely different from Husserl. Whereas the latter was antimetaphysical, primarily interested in logical and mathematical problems, and wanted to found philosophy as a "rigorous science," whereas his intuition is intellectual, Scheler took from

[16] Apart from the reviews, already mentioned, we would mention the excellent Revista de la Facultad de Derecho de México, the Review Filosofia y Letras (Mexico, very important). The Peruvian Review, Revista de las Indias.

Husserl the theory of different regional ontologies, the idea of essences, to which he added values, which are also essences, ideal objects, not created, but only discovered by men. But they cannot be apprehended by Husserl's intellectual, but only by emotional intuition. Thus, Husserl's philosophy as a "rigorous" science, became in Scheler's hands metaphysics, strongly connected, at least in some phases of his development, with Catholicism; hence, the fervent followership of the Neo-Thomists. But his theory of objective values corresponds to deep longings of this period of total crisis. This can be seen from the fact that "axiological" philosophy and jurisprudence is everywhere on the march, and in the most different countries, in the most different forms. Scheler opposed the "formalism" of Kant's ethics and postulated a "material ethics of values" which has been written by Nikolai Hartmann. The ideas of these men on the objectivity, the necessary polarity, the strictly objective hierarchy of objective values, the idea that every duty must have its ultimate foundation in a value, have had deep influence on philosophy and philosophy of law in Spanish America, as well as in Europe. These ideas inspire modern Spanish-American "axiological" jurisprudence, whether Neo-Thomist or not.

Modern existentialism has many forerunners, e.g. in Nietzsche, Kierkegaard, and the Spanish philosopher Miguel de Unamuno. The greatest influence on contemporary Spanish-American jurisprudence is exercised by Dilthey, Heidegger and Ortega y Gasset. Dilthey was primarily interested in giving adequate methods to the cultural sciences, particularly history. To him, contrary to Husserl, philosophy is impossible as a rigorous science; it is the investigation of the enigmas of the world. In natural sciences we use "explanations;" but cultural objects cannot be "explained," they can only be "comprehended" by "historical reason," by "comprehending intuition." Only such intuitionist capturing of sense and meaning can lead to a "conception of the world" "(*Weltanschaung*)." *Dilthey's* concepts of "comprehension" and of "structure" play a great role in contemporary Spanish-American jurisprudence.

José Ortega y Gasset stands for a "perspectivistic philosophy," a "philosophy of the point of view," in order to reconcile reason and history; life is the central subject of his philosophy. Contrary to Descartes, he does not say: I think, hence I am, but: I am, hence I think. Martin Heidegger, extremely influential in contemporary Spanish-American thinking, stems from Husserl, but tries to apply the phenomenological method to human existence; for man's existence precedes, or even is, his essence. He starts, not like Kant from the "ego," but from the "man-

in-the-world." What he wants to give is an "analysis of existence," on the basis of "temporality." This analysis begins with the ordinary, everyday existence of banality, dominated by a feeling of anxiety ("*Angst*") and "care," "concern" ("*Sorge*"). But man can also become an "authentic ego" through resoluteness in the face of death. Writing in an absolutely impossible German which is greatly admired by his adherents and which has—a really acrobatic deed—been marvelously translated by José Gaos[17] into an equally impossible Spanish, he leads us to an atheist existentialism, primarily attracted by Death and the Nothing and ends, as the ultimate wisdom, with the pessimistic insight that "life is without scope and sense." Still more pessimistic is his French follower, Jean-Paul Sartre. There is no doubt that these philosophies truly reflect the total crisis of Occidental culture.

VII

It is the combination of Kelsen's Pure Theory of Law with some elements of the philosophies of the "phenomenological movement" which is characteristic for contemporary Spanish-American jurispurdence, although this combination is very different in different writers. Works of this type, often interesting and by no means lacking in originality, are being produced nearly everywhere in Spanish America. In this survey we can make only a few remarks on the most outstanding authors. There is no doubt that the countries of Spanish America, which are today leading in the field of jurisprudence, are Mexico and Argentina.

In Colombia, apart from the already cited Cayetano Betancour,[18] perhaps the leading figure at this moment is Eduardo Nieto Arteta. He is primarily inspired by Kelsen and Husserl and, to a certain extent also by the Argentinian Carlos Cossio. He is, first of all, interested in logical and ontological problems of law. He tries to combine Kelsen with Husserl, an attempt which already had been made within the "Vienna School" by Felix Kaufmann and Fritz Schreier. His philosophy of law, not yet presented in a systematic form, is, up to now, only sketched in a great number of articles and studies.

Juan Llambías de Azevedo, professor of philosophy of law at the Law School of Montevideo (Uruguay), is certainly one of the finest and most original thinkers in contemporary Spanish America. Contrary to Nieto, he

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[17] M. Heidegger, El Ser y el Tiempo. Traducción por José Gaos. Mexico City, 1951, and José Gaos, Introducción a El Ser y el Tiempo de M. Heidegger. *Ibid.*, 1951.

[18] We want to mention here also an author, not yet mentioned in this writer's book of 1950, namely Abel Naranjo Villegas, Filosofia del Derecho. Bogotá 1947, and Ilustracióne y Valoración. *Ibid.*, 1952.

is primarily interested in the ontological and axiological, not in the logical, problems of law. He tries to combine Husserl's phenomenology with Scheler's theory of objective values. He first of all seeks the essence of law and, by eidetic intuition, reaches the following definition: "Positive law is a bilateral and retributive system of dispositions, made by men for the regulation of the social conduct of a group of men"—thus far the definition is nearly Kelsenian, but he continues—"and as a means of realizing community values." The existence of law is its validity. From here he advances to the ontological problem: Where is the place of law in the general sphere of objects? Making use of Husserl's "regional ontologies," he asserts that law is an object which stands in time, is noncorporeal, but spiritual; law is a mediation between human conduct and community values. These juridical values are, in the sense of Scheler, objective essences. The end of law is not realization of all values, but only those of the community—the juridical values, which stand hierarchically below the religious and ethical, but above the biological and utilitarian values. Hence, positive law must not be overvalued, as it was by nineteenth century positivism, nor must it be depreciated.

Always an original thinker, he has tried in a recent study[19] to give to the ancient problem of justice a new dimension: the problem of justice in time, the problem of what, from the point of view of justice, living generations owe to future ones. He is now engaged in a large and profound investigation, contemplating a work in three volumes on the history of philosophy of law. The first part is already printed and deals with the philosophy of law in the ancient Greece of the pre-Socratic period.

VIII

We have already mentioned the high achievements in philosophy of law in contemporary Mexico. Here a few words may be added on the two outstanding figures.

Luis Recaséns Siches, born in Guatemala, educated in Spain, Professor of philosophy of law in the Universidad Central of Madrid at the time of the outbreak of the Spanish Civil War, fought with the Republicans and settled, after their defeat, in Mexico. In the last years, he has been on leave of absence as professor at the National University of Mexico and has been and is a scientific officer in the Human Rights Section of the Secretariat of the United Nations. He is also reading at the New School of Social Research and is this year a Visiting Professor of philosophy of law in New York University Law School.

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[19] Juan Llambías de Azevedo, "Sobre la justicia prospectiva" (Actas del Primer Congreso Nacional de Filosofía. Mendoza (Argentina). 1949; Pp. 312–317).

Recaséns is a profound student of the philosophy and philosophy of law of all times and nations, a linguist, an indefatigable worker, an excellent translator, and an important and original thinker. The climax of his work thus far is his book on "Human Life, Society and Law."[20] He studied in Madrid under Ortega y Gasset, in Germany under Stammler, in Rome under Del Vecchio, and in Vienna under Kelsen.

His principal work consists of three parts: the ontology of law, analytical, axiological jurisprudence. In the first part, he examines the place of law in the general sphere of objects. Law is to him a form of human life which has become objectivated. Law is part of human culture. Law is a specific significance, a complex of norms of a special type, to be distinguished from religious, ethical, and conventional norms. Law belongs neither to the realm of nature, nor to that of pure values.

In his analytical jurisprudence or theory of law, he is a critical follower of Kelsen. He agrees with Kelsen that justice is not a part of the concept of law; law may be just or unjust without ceasing to be law. Law is characterized by objectivity, heteronomy, bilateral structure, social and inexorable sanctions. Law is a form; its "juridical quality" does not consist of its contents. But that does not mean for the author ethical indifference or acceptance of philosophical relativism. He strictly distinguishes between theory of law and philosophy or "axiology" of law.

To the legal axiology, the third part is dedicated. He tries—and here lies his original contribution to philosophy—to found Scheler's theory of objective values in the philosophy of life of his teacher Ortega y Gasset. His axiology is not philosophy of all, but only of juridical values. Here we deal with the metajuridical problem of the justification of positive law, not of course in a court of law, but in *foro conscientiae*. It is for the author an unavoidable problem, but he recognizes that it transcends the theory of law. Although justice is no part of the concept of law, all law, whatever its contents, is necessarily related to values, regardless of what these values may be and whether they are realized or not. Juridical values stand hierarchically lower than ethical values. True to Spanish individualism, he distinguishes the "person" in law, participating in an inferior rank of values in which all individuals are equal, generalized, schematized, typified, from the "real, authentic ego," the unique, individual participating in a realm of single and individual values, superior in rank to law and state. But as a true democrat and as a Catholic who puts human dignity highest, he tells us that law is basic, that the security guaranteed

[20] Already in the third edition in Spanish. An English translation is presented in Vol. III of the XX Century Legal Philosophy Series (Harvard University Press, 1948).

by the legal order is the *conditio sine qua non* for the fulfillment of one's real and unique life.

There is no doubt in this writer's mind that this work, here briefly analyzed, is the most complete and, at the same time, the most important work of philosophy of law within the whole realm of contemporary Hispanic culture.

Eduardo García Máynez, a Mexican of cosmopolitan outlook, a linguist, a brilliant translator, founder and director of the excellent Review "*Filosofia y Letras*," a ceaseless worker, studied in Mexico under the leading philosopher Antonio Caso, and, later in Germany under Nikolai Hartmann and in Vienna under Alfred Verdross. We see, therefore, in García Máynez, the influence of Kelsen (through Verdross), combined with a certain natural law tendency (Verdross) and a strong adherence to the Scheler-Hartmann theory of objective values. In his first phase,[21] he accepts, to a certain extent, Kelsen's Pure Theory of Law. But for him the formal foundation in Kelsen's "basic norm" does not suffice; the real problem is that of the "ultimate" foundation of law and he feels that this problem can only be solved through Scheler's and Hartmann's theory of objective values. But, contrary to Recaséns, he does not always clearly distinguish between theory and axiology of law and therefore sometimes shows an inclination toward old-fashioned natural law. A very important point in his career is his essay on juridical liberty.[22] This latter is for him a category concerning the exercise of any right, whether absolute or relative, whether public or private. Legal liberty is the authority, granted by positive law, to every person to exercise or not to exercise any right, insofar as this right does not constitute at the same time a duty.

In his present phase of development, while retaining his adherence to Scheler and Hartmann where the problem of the "ultimate" foundation of law is involved, he has become more and more interested in the logical and axiomatic problems of law. He has also reached a closer understanding of Kelsen, whose "General Theory of Law and State" he has magnificently translated into Spanish. The transition is seen in his book of 1950 on the definition of law, an attempt to apply to this problem the "perspectivistic" philosophy of Ortega y Gasset. He believes that the failure to reach understanding on a definition of law can be explained by the fact that different jurists have had in mind three different objects: valid law, natural law, efficacious law. But, as this writer has shown, there is here a

[21] See his first essay, presented in English translation in Vol. III of the XX Century Legal Philosophy Series (Harvard University Press, 1948).

[22] Also presented in English translation, *Supra* (note 21).

double mistake. First, this is not Ortega's "perspectivism," in which three persons look from different points of view on the *same* landscape, but rather the "logic of origin" of the Marburg School, according to which the method creates its object. Second, investigations on three *different* objects cannot lead to *one* philosophy of law. An "integral" philosophy of law presupposes that you look from three different points of view and with three different methods at the *one and identical object* "law," because the latter is so constituted as to allow three different approaches.

In these last years, García Máynez has been particularly interested in the "axiomatic" problems of law.[23] By giving an expose of juridical axioms such as: what is not legally prohibited, is legally permitted; no conduct can, at the same time, be legally prohibited and permitted, and so on, he seeks to prove the existence of a series of principles which have validity a priori, although they express only connections of a formal character and do not refer to the contents of legal norms. He shows that, notwithstanding all the changes of law, as to its contents, notwithstanding all attacks upon the scientific character of the science of law, law, too, has its axioms which are both universal and a priori.

IX

Argentina is the other leading country in contemporary Spanish-American philosophy of law. Apart from the men already mentioned, we would like to direct attention to the outstanding thinker Sebastian Soler. But the most discussed, although controversial, figure at this moment is Carlos Cossio. Cossio is, no doubt, a man of great talent, fanatically devoted to the study of philosophy of law, which is, so to speak, the only concern of his life. In his philosophy of law, we see again an attempt to combine Kelsen's Pure Theory of Law with elements of some philosophies of the "phenomenological movement." But while, thus, the basic materials are the same as in the other leading Spanish-American contemporary philosophers of law, the result reached is entirely different.

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[23] See: E. García Máynez, "La axiomática jurídica y el derecho de libertad" (2 Revista Universidad de San Carlos. Guatemala, January–March, 1946, pp. 203 *et seq.*) "Principios ontológicos y ontológico-jurídicos sobre el hacer y el omitir" (Filosofia y Letras no. 45/46 January–June 1952, pp. 125–130); see also the article by Jose Gáos in the same number, pp. 99–124); "Esencia y estructura del juicio en general y la norma de derecho particular" (Revista de la Facultad de México. Vol. I no. 3/4 July–December, 1951, pp. 319–347); Lógica Jurídica. Mexico City, 1951 (See this writer's review in this Journal, Vol. I no. 1/2, 1952, pp. 163–165); Los Principios de la Ontologia Formal del Derecho y su Expressión Simbólica. Mexico City, 1952; "La lógica deóntica de G. H. VonWright y la Ontologia Formal del Derecho" (Revista de la Facultad de Derecho de México, Vol. III, no. 9 January–March 1953, pp. 9–37).

The principal basis of his philosophy of law is Kelsen. He introduced Kelsen into Argentina and became the leader of the Argentinian Kelsen School. As he stated in an article, Kelsen is to him *the* philosopher of law of our time. But he wants, in his own words, "to go beyond Kelsen, without leaving him." Here the philosophies of the "phenomenological movement" come in. Cossio is a positivist, antimetaphysical, strongly opposed to natural law. As an unbeliever, he sees nothing in Scheler's and Hartmann's theory of objective values. The ingredients of his "egological" theory of law are, apart from Kelsen, Del Vecchio's *aperçu* that law is "human relationship in intersubjective interference," the "philosophy of culture" of the Baden School, Dilthey's concepts of "comprehension" and "structure," certain ideas of Husserl's phenomenology, and, particularly, Heidegger's existentialism and his idea of "temporality."

Cossio's work started in 1930 and was, first of all, inspired by actual Argentinian events, such as the revolution of 1930 and the project of an Argentinian Civil Code; this inspiration corresponds to Cossio's conviction that philosophy of law must be close to the practice of law. He investigated in a series of monographs the problem of revolution on the basis of Kelsen's "fundamental norm," the problem of "gaps" in the legal order and of interpretation. In most points he accepts Kelsen's theory; in some points he adds and develops it, to make explicit what is already implicit in the Pure Theory of Law. His strong emphasis on human conduct stems from Kelsen. His insistence that law necessarily contains also a "value" element can be traced back to Kelsen's dictum that every legal norm constitutes a value. He points out, in conformity with Kelsen, that the science of law must approach a positive legal order objectively; hence the "values" of importance to the science of law are the values embodied in the positive law, as *positive* data *given* to the jurist, whereas speculation about absolute values belongs to metaphysics. But already in his earlier monographs, e.g., the phrase "law lived as a mode of human conduct," we find elements in which his theory is different from, and opposed to Kelsen's theory.

It was in 1944 that he gave us a first attempt at a systematic exposé of his theory.[24] Whereas, because of the insistence on positive values in the law, his theory previously was referred to as a "valuating norma-

[24] La Teoria Egológica del Derecho. Buenos Aires 1944, followed by El Derecho en el derecho judicial, *ibid.*, 1945. The introduction of the first book on the "Phenomenology of the Decision" has been presented in English translation in Vol. III of the XX Century Legal Philosophy Series (Harvard University Press, 1948, pp. 343–400). We see here another characteristic trait of Cossio's theory: the prominence given to judicial decisions, rare in a lawyer of the Civil Law.

tivism," he then introduced the new name of the "egological theory of law." He starts, like Recaséns Siches and Llambías de Azevedo, from investigation of the place of law in the general sphere of objects, making use of certain ideas of Husserl's phenomenology. Law is neither an ideal, nor a real, but a cultural object; the adequate method is, therefore, Dilthey's "comprehension." Among cultural objects, he distinguishes the "objects of the world," objects of the productivity of men, and the "egological" objects, human action in which human conduct as such is articulated. Law is an "egological" object; hence the name of his theory. Law is not, as Recaséns says, "objectivated," but "living" human life. This is the cornerstone of Cossio's theory: law is human conduct. Hence, the object of the science of law is human conduct, not norms. But as all science is cognition by concepts, in law by legal concepts, logic is necessary. The logic must be adequate to its object. The only adequate logic is the "logic of oughtness" which has been definitively discovered and developed by Kelsen; Kelsen's Pure Theory of Law is not science of law, but only "juridical logic." The object of the science of law is human conduct. Legal norms are merely intellectual representations of human conduct. We can, therefore, approach law, without any reference to norms. This is the second pillar of the "egological" theory.

On this basis Cossio has founded his own school; many young disciples in Argentina, some very talented as Julio Cueto Rúa, who was last year a postgraduate student of this writer at the "Law Institute of the Americas" in the Dallas Law School, blindly swear by their master's words. Also older, established jurists in Argentina have become his adherents. We mention Ambrosio L. Gioja, an independent follower of Cossio but at the same time particularly close to Kelsen, and Enrique R. Aftalión.[25] There is no doubt that one reason for this adherence, as in Cossio himself, is the ideal of "*Argentinidad*," the pride in having an "original," Argentinian theory of law. To that is added in Cossio his very great personal vanity, exemplified in his arrogant, overbearing language. Cossio's influence is also shown in some writers outside of Argentina.[26] This writer, while fully recognizing Cossio's talent, devotion to philosophy of law, and merits, has underlined from the first moment, and so in his book of 1950, that the basis of his theory: law is conduct, is wholly untenable. There is also a strong opposition to Cossio in Argentina and

[25] He recently gave a systematic and critical expose of Cossio's ideas in his book: Crítica del saber de los juristas. La Plata. 1951, pp. 353.

[26] E. g. Antonio José Brandão in Portugal, or Paulo Dourado de Guzmão in Brazil; see the eulogy of Cossio in his recent book, El pensamiento jurídico contemporáneo. Buenos Aires, 1952.

his theory has been rejected in the rest of Latin America by most philosophers of law, e.g., Recaséns Siches, García Máynez, Llambías de Azevedo, Miguel Reale.

The thesis that "law is conduct," not norms, is in itself not new. It has been voiced by extreme "realists;" the title of Olivecrona's well-known book is: *Law as Fact.* But Cossio defends himself strongly against being considered a sociological philosopher of law. His "human conduct," he states, is not a part of nature, but "metaphysical liberty phenomenalized." An excellent and penetrating critique of the "egological" theory has recently been made by the Venezuelan philosopher of law Rafael Pinzani.[27]

Cossio's theory has naturally also been rejected by Kelsen. But the recent sharp controversy between Cossio and Kelsen is wholly of Cossio's making. In 1948 Kelsen accepted the invitation of the Buenos Aires Law School to give a series of lectures in French on selected problems of his Pure Theory of Law; it was agreed that Kelsen's lectures would be published in the original French, together with a Spanish translation. Cossio published, in 1949, an article[28] attacking Kelsen's theory and making a detailed and wholly unauthorized use of private conversations with Kelsen. In 1952 Cossio published in Buenos Aires a book under Kelsen's and his name, containing Kelsen's lectures in Spanish translation—the French original has thus far not been published—and Cossio's attack. Naturally, Kelsen protested and asked that this unauthorized book be immediately withdrawn from circulation.

But Kelsen is only slightly interested in these hardly fair methods. Having expressed in 1948, as a guest of the Buenos Aires Law School, only a polite and reticent critique of the egological theory, he has now answered Cossio's challenge with an article of his own.[29] For Cossio put Kelsen before the dilemma, either to admit the superiority of the egological theory or to refute it "annihilatingly." Kelsen felt obliged to do Cossio

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[27] Rafael Pinzani, "Reparos a la teoria egológica del Derecho" (Buletín del Seminario de Derecho Público de la Escuela de Ciencias Jurídicas y Sociales de la Universidad de Chile, Vol. XX, no. 54/56, 1951, pp. 81–96).

[28] In La Ley (Buenos Aires) of October 25, 26, 27, 1949, reprinted in the "Revista de la Escuela Nacional de Jurisprudencia" (Mexico). Vol. XII. no. 45, 1950, Pp. 121–174 and, in German translation, in the Österreichische Zeitschrift für öffentliches Recht (Vienna) Vol. V no. 1/2, 1952.

[29] Published in German in the same Vienna Journal (vol. V, no. 4, 1953 Pp. 449–482) and, in Spanish translation, in La Ley (Buenos Aires) of November 10, 1953 and in Revista de la Facultad de Derecho de México, vol. III, no. 10, 1953, pp. 169–205. This article will soon also be published in the Revista de Estudios Polítticos (Madrid) and, in Italian translation, in the review, Jus (Rome).

this service and of course chose the second alternative. In his answer Kelsen shows himself again the unexcelled master of polemical writing and displays his superior and deadly irony, his penetrating, inexorable power of logical analysis. His critique is restricted to Cossio's own article; it is not a critique from without, but a wholly intrinsic critique, establishing the untenability, the contradictions, and absurd consequences of Cossio's statements. We would like to point out here only the two principal points in which Cossio is opposed to Kelsen. First, Kelsen refutes Cossio's thesis that the Pure Theory of Law is nothing but juridical logic. According to Kelsen, there is no special juridical logic: Kelsen applies logic to the problems of "oughtness;" it is, therefore, if any particular logic, a "normative" logic, which applies to all norms, religious, ethical, conventional, as well as legal norms. And, what is more important, the Pure Theory of Law is a theory of law, not of logic. The logical considerations are merely presuppositions for a correct theory of law, just as logical considerations must precede geometry, without making out of geometry nothing but logic. The Pure Theory of Law analyses the structure of a positive legal order; this is a task which cannot be accomplished by logic, but only by a theory of law. Kelsen shows, further, that Cossio in his axiom that "everything which is not legally forbidden, is legally allowed" commits the crucial error of using the term "allowed" confusingly in two completely different meanings, namely in the merely negative meaning of "not forbidden" and in the vastly different positive meaning of "being authorized."

Kelsen's principal critique goes to the very basis of Cossio's theory: law is conduct. Masterfully analyzing Cossio's verbalism, Kelsen shows the absolute untenability of this cornerstone of Cossio's theory. He shows that Cossio confuses the fact that law regulates human conduct with the object of the science of law, namely the legal norms by which the law regulates human conduct. He shows that Cossio, like extreme "realists," like the early Soviet theory of law, wrongly believes that we can arrive at the cognition of a positive law by abstaining from any reference to legal norms. Now, as has been explained earlier, the thesis "law is conduct" is the cornerstone with which the whole egological theory stands and falls; it is, at the same time, the concept for which Cossio primarily claims originality in his egological theory, which, otherwise, as he states himself, would be no more than a rehash of the Pure Theory of Law. Now Kelsen has proved, through a penetrating and wholly intrinsic critique the untenability, emptiness, the verbalism, contradictions, and absurdity of this cornerstone—a fact that, in the last analysis, Cossio himself is forced to admit indirectly.

Comments

JUDICIAL REVIEW IN GERMANY

Protection of human rights in the Basic Law for the Federal Republic of Germany (Bonn Constitution) of May 23, 1949, has presented the problem of judicial review under quite new aspects, which can be understood only in the light of the historical background. Therefore, in considering this problem, a short summary of the development of judicial review in Germany since the beginning of the 19th century, is pertinent.

I. Situation During the 19th Century

At the beginning of the last century, a modified absolutism of the princes prevailed in all the more important states of Germany. There were exceptions in the Hanseatic towns of Hamburg, Bremen, and Lübeck, with their democratic constitutions, and in other smaller states, such as both Mecklenburgs, where the constitutions had preserved a kind of mediaeval feudal character. For the territory of Prussia, the *Allgemeines Landrecht* (ALR) enumerated the duties and rights—privileges—of the estates of the realm: noblemen, citizens (inhabitants of towns), peasants, innkeepers, apothecaries, merchants, civil servants, clergymen, and students.[1] But even the privileged classes had no right to participate in legislation except only on questions regarding taxation and the lower jurisdiction. Both legislature and administration were concentrated in the hands of the princes. The situation was characterized by the statement of King Frederic William III of Prussia: "I order and the servant and subject has to obey."[2] Nevertheless, a certain protection had been developed against encroachments by the state. The so-called "*fiscus* theory" under a fiction regarded the state as acting in two different capacities, or legal persons. On the one hand, the state met the citizen as a sovereign; on the other, the state—in its function as *fiscus*—acted as an equal partner and on equal terms with the citizen and was subject to the same laws as he. As a sovereign, for instance, the state could expropriate an owner; in its function as *fiscus*, the state was obligated to indemnify the expropriated person. Thus, a citizen could sue the *fiscus*.[3] But there was no judicial review of laws or administrative acts in regard to their consistency with the constitution.[4]

The theory of Montesquieu, the Declaration of Independence of 1776, and the French Revolution brought new ideas and inspired attacks against the existing situation, which culminated in an advice of Napoleon to his brother

[1] ALR §§ 1 II 9 and 34 II 9 ff.

[2] P. Haake, Der preussische Verfassungskampf vor 100 Jahren (1921) 26.

[3] Gustav Böhmer, Grundlagen der bürgerlichen Rechtsordnung. Vol. I (1950) 157, 177, 182.

[4] Walter Jellinek, Verwaltungsrecht (1931) 87.

Jerome at Kassel, to give a constitution "qui efface dans toutes les classes de Vos peuples ces vaines et ridicules distinctions."[5]

Plans for reform came from two quarters. Men like Freiherr von Stein[6] and Joseph Maria von Radowitz[7] tried to reform the historically developed rights and duties of the estates by modifying and extending them to all kinds of citizens. On the other hand, western ideas of the separation of powers and democratic constitutions came to prevail over the old-fashioned estate-constitutions of most of the individual states. Thus, the artificial fiction of the *fiscus* theory became meaningless.[8]

In addition to this and under the influence of Rudolf von Gneist, special administrative courts, separate from the ordinary courts, were created as a means of protecting citizens against the power of administrative agencies. Even in this respect, French ideas prevailed. Under the principles evolved by these courts, administrative acts could not be reviewed as long as the agencies kept themselves within the scope of their discretion; as an exception, arbitrary acts were subject to review.[9] But the problem of protecting the citizens against arbitrary acts of legislation was not discussed and remained unsolved. It seemed to be inconsistent with the position of the prince that the laws should be subject to judicial review. In these deliberations, one argument prevailed, namely, that the judge must be subject to and bound by law; there was no indication that one law had a higher rank than another.[10]

II. Problems of Judicial Review under the Bismarck Constitution

Contrary to the draft of the Frankfurt constitution of March 28, 1849, which never became effective, the Bismarck Constitution of 1871 did not contain a catalogue of human rights. This did not mean, however, that no human rights were recognized at all, but that the sphere of liberties of the individual was regulated by special laws, i.e., on arbitrary arrest, free movement, freedom of the press, of trade, of assembly, etc. Such laws could be changed at will and at any time, and correspondingly, the existing scheme of liberties could be restricted, since there existed no definition of human rights binding the legislature.[11] Consequently, the question of judicial review of laws was necessarily a narrow one. There being no disposition in the Bismarck

[5] F. A. von Campe, Die Lehre von den Landständen nach gemeinem deutschen Staatsrechte (1864) 205.

[6] Pertz, Denkschriften über die Repräsentation in den preussischen Staaten (1819); Denkschriften des Ministers Freiherr von Stein über deutsche Verfassungen. Vol. 1 (1848) 415.

[7] Meinecke, Radowitz und die deutsche Revolution (1913) 20; P. Hassel, J. M. von Radowitz (1905) 220, 439.

[8] Böhmer *op. cit.*, n. 3 at 183.

[9] Decisions of the Reichsgericht, civil cases, RGZ 158/261, 167/14, 168/134, 170/40 ff.

[10] Friedrich Schack, Die Prüfung der Rechtmässigkeit von Gesetz und Verordnung unter besonderer Berücksichtigung Preussens und des Deutschen Reiches (1918) 110.

[11] Paul Laband, Das Staatsrecht des Deutschen Reiches (5 ed. 1911). Vol. 1, 150 ff. Gerhard Anschütz, Die Verfassung des Deutschen Reichs vom 11.8.1919, Kommentar (12 ed. 1930) 447.

Constitution respecting the extent to which a judge could review a law to determine its conformity with the Constitution, various theories were formulated. One recognized review by the courts in formal as well as in substantial respects. Another negated both possibilities, and others emphasized variations between the extremist views. Formal review might be defined as the right to examine whether a law or any other act of the legislature was enacted in the manner prescribed in the Constitution. Substantial or material review denoted a broader examination to ascertain whether the text or meaning of a statute complies with the Constitution.

Laband's view came to be the prevailing one and was recognized in practice. According to this view, in the real sense of judicial review a judge has no right to examine laws as respects their inconsistency with the constitution. Laband not only argued that the judges are subject to the law, but also referred to article 2 of the Bismarck Constitution, under which statutes received binding effect by the prescribed promulgation. Article 17 stated that the emperor had the right of promulgation. This was done by a solemn declaration that the law (statute) had been made in accordance with the provisions of the Constitution. The so-called "promulgation theory" developed a *praesumptio juris et de jure* that the law concerned had been enacted in the manner prescribed by the Constitution and that its content also conformed to the Constitution.[12] The Reichsgericht concurred with this opinion.[13] A presumption of this breadth of course barred the way to substantial judicial review. Even formal review was restricted to an examination whether the law had been promulgated in due form. The promulgation theory was merely a new motivation of an old historically settled principle. It supposed the emperor's authority might be prejudiced if statutes were subject to review by the courts, after he had promulgated them.

On the other hand, this principle was not carried through logically in all respects. It was generally recognized that the judges had the right of review to examine whether laws of individual states were in conformity with the content of the Constitution of the Empire.[14]

As a practical matter, judicial review in this sense was of no particular value. All disputes between the *Bundesstaaten* or between individual states and the Empire were excluded from the jurisdiction of the courts in case the nature of the dispute involved, not private, but public law. Such disputes came before a political institution, the *Bundesrat*, which shared the main burden of legislation with the *Reichstag*.[15] All important disputes between the federal states and the Empire naturally concerned public law. It is most remarkable to find that, in spite of the influence of Montesquieu, the organ of legislation was at the same time the organ of adjudication in these cases.

[12] Laband, *op. cit.*, n. 11, Vol. 2, 44 ff.

[13] Decisions of the Reichsgericht, civil cases, RGZ 9/235, 24/3, 43/420, 48/88.

[14] RGZ 48/205, 64/197.

[15] Article 76 of the Bismarck Constitution. Moreover, after article 7 section III the Bundesrat had the power to give authentic interpretations of the constitution and statutes. Laband *op. cit.*, n. 11, vol. 1, 267.

Disputes arising out of federalism were regarded as the concern of the individual German states, which combined in the *Bundesrat* represented the sovereignty of the Empire. It was a residue of sovereignty that the single states did not submit their main quarrels to a court of the Empire. In this, there was perhaps some similarity of the *Bundesrat* to the House of Lords in England, which also acted as a judicial organ. Even in disputes between individuals or an individual and the state or the Empire, questions of judicial review of statutes seldom arose, because the Constitution did not guarantee specific human rights.

III. The Relation of Judges to the Laws after the Weimar Constitution of 1919

Article 102 of the Weimar Constitution did not introduce any new provisions. It confirmed the old conviction: "the judges are independent; they are subject solely to the law." Independence is conditioned upon submission to the law; otherwise, the courts might supervise the legislative body. Thus, the judge is to decide cases according to the law; after the facts are ascertained, they must be subsumed under the law. At the beginning of an opinion, the court must indicate the articles of the statute or statutes which relate to the plaintiff's claim, and therefrom deduce why the specified propositions cover the facts. Thus, in all his decisions, the judge certifies his submission to the law, which is the basis of his opinion, not the object of the decision. It has been asserted that this form, always repeated in the constitutions—the judge is subject to the law—is as significant for the German State as the form of "due process of law" is important for American law.[16] If the text of a statute is ambiguous, the judge finds its meaning by all means of interpretation in a broad sense. Doubts will arise if there are several statutes which bind the judge and these are contradictory. The problem still is: Can the judge examine whether an ordinary law is consistent with the constitution? Can he review whether a statute of a single state is compatible with the law of the Empire?

Acute disputes arose about this problem. There was unanimity only as regards the following three points: that the judge had to review whether a statute had been promulgated correctly; whether a statute of a single state was consistent with the law of the Empire; whether a legislative act—*Verordnung*—was consistent with the law authorizing its enactment. For the rest, good reasons were presented both for and against judicial review. It is quite remarkable to find that the old arguments which have been mentioned above in the section dealing with the Bismarck Constitution prevailed. Thus, the famous commentator on the Weimar Constitution, Anschütz, defended the "promulgation theory" of Laband.[17] In the negation of judicial review concerning the consistency of laws of the Empire with the Constitution, he sees

[16] Carl Schmitt, Der Hüter der Verfassung (1931) 37.

[17] Anschütz, *op. cit.*, n. 11, 324.

an historical fact of German and European tradition. He makes allowance only for one exception, i.e., the case when in a dispute between the Empire and a single state the constitutionality of a statute of the Empire is in question.

However, the Reichsgericht reached another solution, which was contrary to the situation under the Bismarck Constitution. This court abandoned the historical conception of judicial review on the ground that there was no proposition in the Constitution which denied the judges a right and a duty to undertake such examination. Therefore, judicial review in this broader substantial sense had to be allowed.[18] It is another question how far such a review might be extended, and it remained unsolved whether a court might inquire whether a statute was consistent with the general rules of the Constitution. In this respect, there is a remarkable difference from the famous opinion which Chief Justice Marshall gave in 1803 in the case of *Marbury v. Madison*[19] that the Constitution of the United States contains fundamental principles, by which the powers of the legislature are defined.

The reason why judicial review remained narrowly restricted even under the Weimar Constitution was founded on the idea that the Constitution was a law like all other statutes and that it might be changed pursuant to article 76 as soon as a qualified majority appeared in parliament.

Contrary to the United States Constitution, the Weimar Constitution was not an instrument superior to the legislature, but it was instead subject to the discretion of the *Reichstag*. Thus, even human rights recognized in the Constitution, could be annulled or abrogated, if and when it pleased the legislative body to do so.[20] Consequently, parliament could discretionarily alter the balance of powers between legislature, executive, and the courts.[21] In fact, the lack of unanimity of the parties often weakened the position of the *Reichstag* nearly to incapacity. But there was the famous article 48 empowering the *Reichspräsident* to enact orders for re-establishment of public security and order. As a result of decisions of the *Reichsgericht* enlarging this power, the *Reichspräsident* became an extraordinary legislator, by whom seven of the constitutionally guaranteed human rights could be removed every day.[22] Thus, article 48 finally became the paragraph of dictatorship. All these arguments show how weakly the position of human rights was elaborated. As human rights should signify protection of the individual against the discretion

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[18] RGZ 111/320 ff, RGZ 118/325 ff.

[19] Noel T. Dowling, Cases on Constitutional Law (1950) 94 ff.

[20] There was developed a theory that article 76 contained a limitation on the legislative body, insofar as abrogation of the constitution was only possible for some propositions of lower importance. But this theory could not be supported by the meaning of article 76.

[21] It is interesting to state that the problem of a possible dictatorship has not been recognized during the constitutional struggles of the 19th century. Bluntschli: Allgemeines Staatsrecht (4 ed. 1868) vol. 1, 561—emphasized that the legislative body in its very creation already bore the most important guarantees that it would not exercise its power contrary to the constitution.

[22] Anschütz, Kommentar, *op. cit.*, n. 11, 250 ff; Schmitt, *op. cit.*, n. 16, 118 ff.

of the legislature, it is quite obvious that ineffective defense of human rights implies corresponding restriction of judicial review.

Moreover, human rights, as contained in the Weimar Constitution, did not have the same character as the fundamental rights of the United States Constitution. For example, article 109, section 1, prescribed that all Germans are equal before the law, but it was disputed whether this proposition was addressed to the administrative agencies and the judges only or whether it was binding on the legislature as well. The ruling opinion was that this constitutional provision had no binding force limiting the legislature.[23] Thus, no problems of equality between men and women could arise, such as nowadays occupy parliament and judges. Other human rights were similarly treated. Practically, there was no progress beyond the situation at the time of the Bismarck Constitution. In all points relating to human rights, it had to be ascertained whether they contained subjective rights, binding even the legislature, or instructions to the executive body and to the courts, or only programmatic declarations for future development. As a rule, therefore, a court could not review the question whether a law of the Empire or of a single state was in conformity with any of the fundamental rights of the Constitution.

IV. The New Form of Judicial Review under the Bonn Constitution

In the previous discussion, it has been shown that the development of judicial review was very slow. Historic convictions and prejudices determined the situation. Theoretically, there seemed to be an enormous progress from the times of the Bismarck Constitution to the Weimar Constitution; judicial review was enlarged from mere formal examination as regards ordinary promulgation to substantial review of the consistency with the Constitution of any law of the Empire or a single state. Nevertheless, hardly any change in practice could be observed, because of the vulnerable position of human rights in the Constitution. Consequently, the development of human rights involved the question of the scope of judicial review. A rather continuous development took place in the position of human rights from the Bismarck Constitution after the Weimar Constitution to the Bonn Constitution. And here too lies a milestone in the evolution of judicial review.

The Bonn Constitution is not on the level of other laws; it has superior rank and consequently has been designated the "basic law." Thus, its legal character is similar to that of the United States Constitution. This has involved overruling an old principle, as a result of which the fundamental rules of the Constitution are no longer at the mercy of the legislature, which thus is subject to the fundamental human rights in the Constitution. Article 19, section 2, reads that "in no circumstances may any fundamental law be touched in the content of its real nature." In addition, article 1, section 2, declares that fundamental human rights are inviolable and inalienable—guaranteed as a

[23] Anschütz, *op. cit.*, n. 11, 461 ff; there was no case in which the Reichsgericht could determine the question, but the Reichswirtschaftsgericht agreed to the ruling opinion.

permanent law by the Basic Law. At the same time, they have lost their uncertain character as mere declarations of a future political program, and have the character of law immediately binding the legislature, the executive, and the judiciary. In these respects, the same words in the Bonn Constitution and the Weimar Constitution have quite different meanings. For example, article 3, section 1, of the Bonn Constitution repeats a fundamental principle of the Weimar Constitution; while article 109, section 1, of the latter provided "all Germans are equal before the law," it now reads "all men are equal before the law." The difference between the words "men" and "Germans" does not touch our problem, because the principle of equality was not restricted to Germans even under the Weimar Constitution. But a fundamental change has taken place in the meaning of these sentences, because equality is now an immediately binding requirement—even for the legislature—which confers on everyone a subjective right. Thus, the problem of judicial review would arise if the *Bund* or the *Länder* were to enact any statute or rule violating the principle of equality.

In spite of this guaranty of fundamental human rights in the Bonn Constitution, the legislative body may restrict them by statute in certain respects (article 19, section 1). It therefore will be one of the main tasks of the courts to define the content of the real nature of the human rights, with respect to which no restriction is possible under any circumstances. The commentator of the Bonn Constitution—von Mangoldt—conceives that it will be difficult to find a general description or definition of the content of the real nature of human rights, valid for all times, because the meaning of conceptions changes with changing times.[24] Thus, one might say that the task of the *Bundesverfassungsgericht* is similar to that of the American Supreme Court, in that it too must give content to the conceptions of the Constitution and adapt them to the changing circumstances of life. For instance, article 2, section 2, allows the *Bundestag* to restrict the right of personal liberty, but it does not allow the right of life and personal integrity to be infringed. And article 8 allows restriction of the right of assembly only in case of assemblages in open air.

It is quite obvious that the scope of judicial review has acquired an importance not previously known. Problems which in former times could not arise have appeared, and the courts have to deal with a variety of new questions. In consequence, their activities are discussed more than has been usual in the past. A practical example is the principle of equality between men and women as sanctioned in article 3, section 2. Article 117 provides that the previous law regulating the relation of men and women should remain in effect until March 31, 1953, by which time it was anticipated that the legislature would have enacted a new law. Parliament did not do so. Hence, a question of judicial review has been presented, to determine which parts of the old law are no longer compatible with the principle of equality of both sexes. As long as there are no decisions of the highest courts on all particular

[24] von Mangoldt, Das Bonner Grundgesetz, Kommentar, 1. bis 3. Lieferung, 120.

questions, there will be a period of confusion, because different judges may differ in their opinions on these matters, and the values of judicial security and predictability of decisions are endangered.[25]

Competence to examine whether a law is incompatible with the Constitution has been regulated by article 100, section 1. Only special constitutional courts, the *Bundesverfassungsgericht* for violations of the federal Constitution by laws of the Federation or of individual states, and the constitutional courts of the *Länder* if the constitutions of the states are violated, have authority to examine whether a statute is inconsistent with the Constitution. This examination follows a special procedure and is withdrawn from the ordinary courts.[26] An ordinary court deciding a case must determine whether the statute on which its opinion must be based, is not inconsistent with the Constitution. Only if it finds that such is not the case is the decision adjourned until the *Bundesverfassungsgericht* in a special procedure—*incidenter*—has given its opinion on the incompatibility or compatibility of the statute concerned with the Constitution.

In other respects, the right of judicial review of the ordinary courts is broader. All these courts may themselves examine whether a previous law antedating the Bonn Constitution is inconsistent with the Constitution. As a result, even if so, there is no interruption of the proceedings and no decision—*incidenter*—of the *Bundesverfassungsgericht* required.[27]

V. Constitutional Complaint (*Verfassungsbeschwerde*) as the Ultimate Stronghold of Human Rights: A Special Kind of Judicial Review

The Bonn Constitution has strengthened human rights in a way that the strongest champions of this idea could not have foreseen during the 19th

[25] The uncertainty as to the question of equality between both sexes is exemplified by the opinions of the Court of Appeal of Frankfurt, Neue Juristische Wochenschrift 1953, 746 ff. and of the Kammergericht of Berlin (West), Neue Juristische Wochenschrift 1953, 985 ff, and articles in Deutsche Richterzeitung 1953, 117 ff.

[26] Geiger, Gesetz über das Bundesverfassungsgericht, Kommentar 1952, 238 ff. Concentration of the main points of judicial review in some constitutional courts is no new idea. It was already mentioned by Anschütz.

How far some courts went before the existence of the Bundesverfassungsgericht is shown by the Landgericht at Bonn (Monatsschrift für Deutsches Recht 1948, 155) which believed the examination might be extended to the consistency of any statute with the principles of law and morals.

[27] Decision of the Bundesverfassungsgericht of February 24, 1953, Monatsschrift für deutsches Recht 1953, 281 ff. The discussion about judicial review has become one of the central questions of lawyers. That may be shown by a lecture of Professor Dr. Eberhardt Schmidt on "Law and Judge, Merit and Demerit of Positivism" (Schriftenreihe der juristischen Studiengesellschaft, Karlsruhe). He emphasizes that the negative statement of incompatibility of a law with the constitution might be reserved to a very small number of cases, in order to avoid the supposition that the judge controls the legislative body. He does this in the very interest of the judges and sees a danger that, if the judge controls the parliament, he will be made responsible for all mistakes of the legislature.

century. Nevertheless, it has been felt necessary to take still another step towards the protection of the individual. Paragraph 90 of the law on the *Bundesverfassungsgericht* of March 12, 1951, provides for a proceeding not regulated in the Bonn Constitution, the constitutional complaint. This complaint is available to any person whose human rights have been violated, against any act or rule of any of the three powers of the state. It is not another species of appeal but a particular institution. In such a case, the *Bundesverfassungsgericht* is not bound by the facts which the ordinary courts have found, but it may ascertain the facts itself. But the review is restricted to an examination whether one of the human rights as guaranteed in the Constitution has been violated.[28] This means that if a party has lost a civil case in all instances, the complainant may assert that by the decisions of the ordinary courts one of his human rights has been violated. This certainly involves the danger of opening the door to litigation.[29] Abuse of this procedure might paralyse the work of the *Bundesverfassungsgericht* by overcrowding it with unnecessary complaints. Criticism has already arisen on the ground that the protection of the individual by the institution of the constitutional complaint has gone one step too far.

By these means of review, described under IV and V above, the *Bundesverfassungsgericht* is the dominant organ of the Constitution, as such controlling the legislature, the administration, and the ordinary courts. Of course, its control must be exercised through legal decisions, and one of the main difficulties arising may be to define the borderline between judicial and political decisions.[30] The prestige of the *Bundesverfassungsgericht* will depend on how its judges deal with political questions and the manner in which their powers of judicial review are exercised.

HEINRICH NAGEL*

[28] Geiger, *op. cit.*, n. 26, 272 ff.
[29] Günther Schultz in Monatsschrift für deutsches Recht 1953, 22.
[30] Deutsche Richterzeitung 1953, 11; Geiger, *op. cit.*, n. 26, 138; Schmitt, *op. cit.*, n. 16, 111.
* Dr. jur., Landgerichtsrat, Bremen.

CONSTITUTIONAL LAW OF IRAN

The recent trial of the former prime minister of Iran, Dr. Mossadegh, dramatically illustrates the difficulties involved in a sudden adoption in countries such as Iran of traditional principles evolved in the course of the long development of Western political thought. The occasion invites a brief examination of a few of the basic principles embodied in the Constitution of Iran, connected with the limitations placed upon the power of the crown, the coming into power of a particular government, its dismissal, the power of the parliament, and, finally, possibility of trial of the cabinent members and their punishment. It should be borne in mind that this is a first attempt to study the constitutional law of Iran.

Crown and Cabinet

In the last two decades of his reign which was ended by an assassin in 1896, Naser-ed-Din Shah, the king of Iran, had established a sort of cabinet, the chief and members of which were all appointed by himself. Their sole responsibility was to the king. During the reign of his son, Muzaffar-ed-Din Shah (1896-1907), the constitutional revolution of Iran took place with the alleged purpose of restraining the monarch and establishing a democracy. In respect to ministers some provisions were made, the most important of which, article 46 of the Supplement to the Constitution, provides that "Dismissal and appointment of the ministers is in accordance with the royal decree of the King."[1]

At the first sight, the wording of article 46 appears to have discarded all the accomplishments of the revolution and restored the system under Naser-ed-Din. But the intention of the framers seems to have been different. In considering the interpretation to be placed upon article 46, it should be borne in mind that, traditionally, there is no constitutional law in Iran in the sense understood in the United States. There are two basic reasons for this.

First is the lack of a concept of constitutional principles in that country. This is a Western concept and was imported into Iran somewhat imperfectly during the latter years of the 19th century. Secondly, the Constitution itself provides against the development of court-made constitutional law. Article 27 of the Supplement to the Constitution prescribes that "The explanation and interpretation of laws are a special function of the National Assembly." This article embodies the principle of the supremacy of the National Assembly in making laws. If a law apparently contradicts the Constitution, the law will be the final authority, because it is for the Assembly and not a court to say what the Constitution means. At least, this is the interpretation given to similar articles in the Dutch and Belgian constitutions, both of democratic monarchies which have influenced the form and substance of the Iranian Constitution.[2] It is therefore idle to search the court records for the interpretation of Article 46.

[1] A translation of the constitution of Iran is available in Peaslee, Constitutions of Nations (The Rumford Press, Concord, N. H., 1950) v. 2, 197-214. This translation seems to come from the British parliamentary papers. The translator surely was British, learned in law, who had later obtained knowledge of Persian. At least in one point, this translation seems not to conform with the Persian text. I shall therefore use the Persian text as the basis of this study and make my own translations. For a Persian text see Majmu a-yi Qaivenin, published in Teheran by the Parliament Printing House, 1939. v. 1-2, pp. 3-33.

[2] No study has as yet been made of the exact intellectual origins of the Constitution of Iran. Its similarity to the Belgian Constitution—in some articles, including those quoted and others which will receive consideration in this study, there is a verbatim adoption—and the background of social intercourse between Iran and the Low Countries and France, warrant the inference that Iranians were copying from these nations. The adoption by Iran of the interpretation in these countries, of constitutional questions, however, may well be open to question.

In respect to provisions similar to those in article 27, paragraph 2, however, see Schiller, A. A., Civil Law Institutions, Historical Development. Columbia Law School (unpublished manuscript, 1947) 44.

There are only two available sources: (a) history and practice in Iran; (b) other articles of the Constitution which may have bearing upon the point.

(a) The present constitution of Iran was promulgated as a consequence of a revolution in 1905–7. The scanty material on the history of the revolution reveals that the revolutionaries had patriotic and fanatic convictions, but knew very little of constitutional theories. Long tradition and background in the field of political philosophy was absolutely lacking. The Constitution of Iran therefore does not have a national scholastic history in which one may find the origins of the concepts expressed in the instrument. Nor was there a constitutional assembly where the articles could have been debated and their meanings disclosed in the debate records. King Muzaffar-ed-Din (1896–1907), issued a decree to his Grand Vezir to establish a Mijlis, or parliament, and also to draw up a constitution which he signed a few days before his death. The Supplement to the Constitution was signed by his son after succeeding to the crown. Pressure there was to produce the documents, but no intellectual preparation other than copying from Western European countries, mainly Belgium. There is no light therefore to be shed upon the meaning of Article 46 by searching events preceding 1907.

On January 19, 1907, Muhamed Ali was crowned. He promptly bombarded the Mijlis, abrogated the constitution which his father and himself had signed, and shot as many revolutionaries as he could. An uprising dethroned him in 1909 and crowned his minor son Ahmed with a regency.[3] It is from this date that the Constitution of Iran began its real life; thus, two revolutions and one dethronement furnish the background of early interpretations of the Constitution. The tendency naturally was towards more limited monarchy. Two developments support this contention: first, the indefinite postponement of the opening of the senate;[4] second, the practice established in connection with Article 46 of the Supplement to the Constitution. The latter is of great interest to this study.

In order to avoid any charge that the king should seek, contrary to the wishes of the people, to appoint as premiers individuals who are not altogether in favor

[3] Generally on the history of this period see: Hone, J. M. and Dickinson, P. L., Persia in Revolution, T. Fisher Unwin, London, 1910; Fraser, D., Persia and Turkey in Revolt, William Blackwood and Sons, Edinburgh and London, 1910; Brown, Edward G., A Brief Narrative of Recent Events in Persia and a Study of the Constitution, Luzoc and Co., London, 1909; *id.*, The Persian Constitutional Movement, H. Milford, Oxford University Press, 1918; *id.*, The Persian Revolution of 1905–1909, Cambridge, The University Press, 1910.

[4] The Constitution elaborately lays down rules for the establishment of the senate. Half of its members were supposed to be appointed by the king. In order to assure the people that the king would not attempt to influence the course of affairs, the creation of this house was entirely abandoned. At least it was not established until 1949, when despite some vigorous protests the senate was opened, but it was again voted out of existence by the lower house two years later.

In connection with establishment of the senate see New York Times, March 2, 19: 6, 1949; on the Constituent Assembly for the amendment of the Constitution, *id.*, May 10, 16: 6, 1949; on the termination of the senate, *id.*, October 24, 5: 4, 1952.

of a democratic regime, Ahmed Shah established a tradition never to appoint anyone to this office unless the parliament had by a vote indicated its preference. Then the candidate so preferred received the royal decree, chose his ministers, and presented the cabinet with his program to the parliament for a vote of confidence. By this tradition or constitutional custom, the king entirely abandoned his power to appoint a prime minister, even if it could be said that he previously had such power.

The last time that this constitutional custom was exercised under the Kajor dynasty, which was overthrown in 1925, seems to have been in January, 1923, in connection with the cabinet headed by Mustofi, the 63rd cabinet in the short-lived democracy of Iran.[5] Between this cabinet and the advent of Reza Pahlavi, the founder of the present dynasty, there was one more cabinet. A formal vote of preference was not obtained, presumably because only a few days were left of the 4th Session and the person appointed was particularly favored.[6]

From the accession of Reza Shah Pahlavi to the throne in 1925 to his deposition in 1941, there was a sort of constitutional holiday in the country. He was an absolute king and did all that he wished, including dismissing and appointing prime ministers.[7]

In 1941 when the present king was crowned, the old practice of the vote of preference was restored and continued until 1949. In this period, no prime minister took office without a vote of preference, unless the parliament was not in session.[8] During these years, however, the frequent changes of cabinets gave rise to a school of thought that the king should be given power to dismiss the parliament at the request of a government having lost a vote of confidence. The Constitution of Iran did not have such provisions. In 1949 a constituent assembly was called, and an amendment was enacted granting to the king the power of dissolution of parliament. Thereafter, the king also abandoned the practice of asking for a vote of preference in order to choose a prime minister. Many protests were made against the change of the Constitution and particularly against abandoning the traditional procedure of choosing a prime minister. Among this group was Dr. Mossadegh. The king however did not heed the protests and went on appointing the premiers.

Mossadegh constantly protested against all of the premiers who received office without a vote of preference by parliament until his own turn. When in 1951 he was nominated the case was submitted to the parliament for a vote of

[5] Makki, H., Tarikh-i Bist-Sala-i Iran (three volumes) vol. 2, p. 160.

[6] *Ibid.*, 236.

[7] In connection with the history of this period, very little material is available in Persian, perhaps mainly because publications were censored. But his absolute power is common knowledge among Iranians. *Cf. id.*, vol. 3; also Essad, Bey, Reza Shah; Lenczowski, George, Russia and the West in Iran, Cornell University Press, Ithaca, 1949.

[8] The most dramatic case of this period is the vote of preference given to Ghavam by a margin of one vote. He received the decree and formed his government. To the termination of the session, the parliament never succeeded in convening, and Ghavam remained prime minister without a vote of confidence. For the vote of preference, see New York Times, January 27, 1: 4, 1946; for the termination of the session, *id.*, March 12, 2: 2, 1946.

preference, which was given to Mossadegh thereby restoring the old practice.[9] In July, 1951, when he resigned the parliament again was asked for a vote of preference, which was given to Ghavam.[10]

In this fashion the practice of obtaining a vote of preference became a concomitant part of the constitutional provision of appointing ministers. One can also argue that since there were gaps once of fifteen years and again of two years in the continuity of this practice, it was therefore never established and has not qualified the power of the crown to appoint ministers.[11]

As for the power of dismissing ministers, there appears to be no occasion that it has ever been exercised. With the exception of the years 1925–1941, not a single case of dismissal of a prime minister who had received the vote of confidence from the parliament seems to have taken place. The fact that there has never been a case does not mean that there cannot be such in the future, but the power of the king to dismiss prime ministers at his will is not altogether in conformity with the spirit of the Constitution. It is difficult to imagine how a king could dismiss a prime minister whose party controls the parliament and has given him support and confidence. Such power would scarcely be compatible with the party system.

(b) There are many other provisions in the Constitution which tend to clarify more vividly the position of the crown and the ministers and in fact support the more liberal interpretation of the Constitution as traditionally adopted.

Article 27 of the Supplement to the Constitution places all executive powers in the crown as ". . . defined by the law." This qualification in the light of other articles seems to be very important.[12] Article 44 states: "The person of the king is absolved from all responsibility; the ministers of Government are responsible to the parliament in every matter." The next article makes "all the oral and written decrees of the king" ineffective, unless signed by the responsible ministers, "who shall be responsible for the accuracy of the contents thereof." These two articles seem to embody the concept of a sovereign remote from the political schisms of a parliamentary system, while at the same time providing for a strictly responsible body of ministers for the general administration of the country. The term "all the oral and written decrees" in Article 45 seems to be so general that it would also include an order of dismissal of a minister who, according to Article 44 and also Article 64, is forbidden to divest himself of responsibility, under pretext of an oral or written decree of the king. Accordingly,

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[9] Et-tela-at, April 30, 1951.

[10] *Id.*, July 17, 18, 19, 1951. And when Ghavam resigned within two days and Mossadegh took office once more, the vote of preference was taken for the latter. *Id.*, July 23, 1951.

[11] In fact by upholding its own jurisdiction, the miliary court trying Dr. Mossadegh took this view.

[12] The last paragraph of article 27 of the Supplement prescribes, "Third . . . the executive power which is special to the king, that is, the laws and ordinances shall be enforced by the ministers and the agents of the Government as defined by law, and in the majestic name of the king." The last two qualifications, "as defined by law" and "in the majestic name of the king," in the light of other articles, seem to be significant.

a minister receiving an order of dismissal will be responsible for the consequences of vacating his post.[13]

One may now ask how a minister is to be changed. The practice established throughout many years requires either resignation or loss of a vote of confidence in the parliament. Article 67 of the Supplement provides that, if either one of the houses has expressed dissatisfaction in respect to one or all of the ministers, that one or all shall be dismissed. This provision leaves no doubt on what really was meant by Article 46. It is no more than a unification of the sovereignty in one person, the head of the state, while responsible ministers will have to answer to the parliament.

Parliament and the Executive

Under a system such as is discussed above, it is easy to see how parliament would emerge as the most powerful organ of the government. This was particularly true so long as no provision for the dissolution of the parliament was included in the Constitution. The cabinet was at the mercy of the parliament. Its power was such that on October 31, 1925, the parliament deposed a dynasty by an ordinary vote.[14] The main idea in this system was to restrict the crown and create a powerful elective legislature with the ministers responsible to it. Any suggestion that the crown under the Constitution of Iran has power to dismiss and appoint ministers by-passing the parliament would be a return to Naser-ed-Din Shah's era.

In practice the parliament has developed a system of interrogating or censuring the cabinet. Article 67 of the Supplement to the Constitution states that when either one of the two houses expresses dissatisfaction with one or all ministers that one or all shall be dismissed. This power is exercised by the deputies of the parliament submitting questions in written form and demanding an explanation by the government. If the questionnaire is signed by a number of deputies and particularly if it is termed "Estizah," meaning "to ask for a clarification," then the government or minister in charge must appoint a certain time for appearance and answer. If the answer does not seem satisfactory, the government has to ask for a vote of confidence. If this is not accorded, the government falls. Very often, however, the prime ministers reshuffle the cabinet by sacrificing one or two ministers who were not particularly favored, thereby saving the cabinet.

This practice of "Estizah," which is too often the cause of the downfall of governments, has been severely criticized. In Iran, where there are no defined parties, cabinets have changed with astonishing frequency. Because of this

[13] Dr. Mossadegh argued along this line in his trial. The court did not face and did not decide the questions raised. It maintained that application of the plain meaning of article 46 was not interpretation or explanation of the provisions of the Constitution, thus not contrary to article 27, paragraph 2. The defense contended that the application of plain meaning is a sort of interpretation and the court should not do it, or if it must, it should also look to the other articles of the Constitution which qualified article 46. The court admonised the defense for insisting upon this view.

[14] Sheean, V., The New Persia, New York, The Century Co., 1927, p. 59–61.

weakness, a school of thought has developed advocating amendment of the Constitution so that the irresponsible parliament can be controlled. This control has been urged as particularly needed in view of the institution of "speech before the order." In practice this means that deputies may take the floor before the speaker calls parliament to order. Some very violent attacks have been made upon the government in these speeches, the effect being to impair the position of the cabinet.

With the amendment of the Constitution in 1949[15] introducing the power of dissolution, some of these problems were thought to be solved. In practice, however, this has not proved to be the case. Five other cabinets, within two and a half years, have fallen without a dissolution of parliament. In August, 1953, for the first time Dr. Mossadegh tried to make use of this power. He could not obtain the approval of the crown, resorted to a plebiscite, and finally was removed. But in December, 1953, a royal decree for the first time in its history dissolved the parliament of Iran and announced elections.[16]

Articles 65, 69, and 70 of the Constitution regulate the criminal prosecution of ministers. These articles provide that parliament must prosecute, and the supreme court shall have original jurisdiction. To implement these constitutional rules, a "Law for the Trial of Ministers and the Jury" was enacted in 1928.[17] This law elaborately sets forth the rules for such prosecution and the procedure in connection therewith. Hitherto, ministers always have been tried by the supreme court after impeachment and prosecution by the parliament in accordance with the law of 1928. Mossadegh's trial by a military court was the first of its kind. When the question was raised by Mossadegh in objecting to the court's jurisdiction, the court said that, since the king had power to dismiss him as a prime minister and the prosecution concerned acts committed after the order of dismissal, these acts were beyond his ministerial functions and therefore within the power of the court. It seems that this military court has upheld the general practice that ministers should not be tried unless prosecuted by the parliament, although its position in respect to dismissal may well be open to doubts as discussed in the first part of this comment.

A. FARMANFARMA*

[15] See *supra*, note 4.

[16] New York Times, December 20, 1953, 1.

[17] The first article of this law reads: "If the prime minister or a minister is accused of committing a crime in connection with his work or duty he shall be prosecuted by the National Assembly regardless of whether or not he held the ministerial position at the time of prosecution."

* Ph.D. University of Chicago.

TORT LIABILITY AND INSURANCE OF ENTERPRISE IN YUGOSLAVIA

Between the two World Wars, Yugoslavia was not able to achieve unification of her inherited six legal systems. Upon liberation, all laws enacted by the occupying authorities were repealed; pre-invasion laws having become

ineffective, the formulation of a new unified law was left to later codification and court practice.

Since the Law on the Management of Enterprises of 1950, all government enterprises have been managed by workmen's collectives through councils of workers and boards of directors. Simultaneously with this reform which abolished state management, the principle of profitability and free competition has become an essential feature of Yugoslav economy. It is this development which has made necessary a reformulation of the rules governing the law of torts and damages.

Prior to the liberation of Yugoslavia, this field of the law, directly or indirectly, was governed by the provisions of the Austrian Civil Code of 1811, which, as interpreted by the supreme courts of each province, had retained the principle of liability for fault, modified only slightly by strict liabilities for certain dangerous enterprises. The new courts of arbitration, however, which as special commercial courts now are in charge of all civil litigation between governmental enterprises, have established a new rule of strict liability for any harm caused by an employee of an enterprise within the scope of his employment, a rule very similar to the Anglo-American doctrine of *respondeat superior*, though distinguishable in that the employee himself may not be sued directly. This rule of objective liability has been extended to all fields of enterprise. As all major economic activities are conducted by co-operatively owned enterprises, objections, which might otherwise be justified, to general application of the rule of strict liability in the sphere of economic activity, on the ground of hardship to minor business or nonbusiness activities, have been eliminated.

With the passing of management from the state to labor, this development has taken on a new aspect. For the new liability, directly affecting the workers' interests, has become an incentive for greater care. This incentive is further increased by the encouragement of subrogation suits by the enterprise against the worker in cases of proved carelessness, although the latter's personal liability to the injured party has been abolished.

Since the enactment of these reforms, insurance has necessarily gained new and decisive importance. In 1947 and 1948, compulsory accident insurance was introduced, covering passengers of railroads, steamboats, busses, taxis, and all other public conveyances from the moment of access to the premises, including all incidents of travel. Moreover, railroads have been required to insure all goods in transit, and all state property must be insured against fire.

In addition, general, though theoretically voluntary, insurance schemes cover about 70 per cent of all school children and students, and large percentages of voluntary fire brigades, hunters, and hotel guests. Other types of accident insurance, such as those of the users of bathing facilities, or, most important of all, workmen (who also share the benefits of social insurance), have reached a 100 per cent coverage through incorporation in standard contracts.

While these schemes have worked satisfactorily in practice, there are many questions yet to be solved:

1. It is still uncertain whether and, if so, how far a person injured in an accident covered by accident or property insurance may recover both under such insurance and in tort against the injurer. Several law courts have decided to deduct the insurance proceeds from the tort recovery, but the highest court has yet to pass on this question.

2. While the principle of fault thus has been largely displaced by accident and property insurance coverage, the principle has been preserved in the prosecution of subrogation claims. Since this practice has proved very useful in the field of railroad liability by reducing damage to goods in transit, its extension to the field of personal injuries is contemplated; until the legislation of 1950, when the enforcement of such claims ceased to be tantamount to a mere transfer from one state account to another, the principle of fault was inapplicable.

3. Moreover, it remains to be seen whether recovery under the principle of fault should not be limited to gross negligence.

4. Finally, as long as there is need for liability insurance, there may be multiple insurance for the same risk. Under a complete scheme of compulsory or general accident and property insurance it should become feasible to avoid such multiplicity, to the possible exclusion of liability insurance, by the collection of a single premium.

The extension of strict enterprise liability so as to cover all activities and all damages emphasizes the importance of insurance. As the entire field of insurance in Yugoslavia is controlled by the State Insurance Enterprise, the possibility of considering insurance as a public service that might establish the requisite conditions for insurance to fulfil its purpose on a broad plan, should not be overlooked. In view of these outstanding problems, it has not been deemed advisable at the present time to replace the tort liability of enterprise entirely by insurance. While the latter may be a preferable means for distributing losses, stress continues to be put on the educational value of the enforcement of tort liability.

ALEKSANDER GOLDSTAJN*

* President, Supreme Arbitration Court, Belgrade.

NEW LEGISLATION

SPAIN: LAW OF JULY 17, 1953, ON LIMITED LIABILITY FIRMS (*Sociedades de Responsabilidad Limitada*)—Limited liability firms[1] have existed in Spain for many years, but it is curious that until recently there has been no law govern-

[1] This form of *sociedad* corresponds to the Gesellschaft mit beschränkter Haftung (G.m.b.H.) of Germany or the Société à responsabilité limitée of France and in English law has an equivalent in the private company.

ing their activities. In connection with the regulation of companies (*sociedades anónimas*) in 1951,[2] it was announced that a law on limited liability firms (*sociedades de responsabilidad limitada*) would be enacted, which in fact was promulgated on July 17, 1953.[3] The law is quite brief, including thirty-two articles and four transitory provisions; it establishes a simple and sufficiently liberal system.

To constitute a *sociedad*, previous authorization of the government is not required;[4] inscription in the mercantile register of the "*escritura constitutiva*" (charter and bylaws) which must be an "*escritura publica*" (writing enrolled by a notary public) is sufficient, on compliance with which requirements the *sociedad* acquires legal personality.[5] It is necessary to bear in mind that public notaries in Spain are specially qualified to authenticate acts taken before them, even as respects contents.

In this form of association, the capital consists of participating shares, which cannot be represented by negotiable documents nor denominated as "*acciones*" (shares of stock). The number of members shall not exceed fifty, and a member is not responsible for the debts of the firm,[6] his liability being limited to his respective contribution, except when there are contributions not in money, in which case all members are solidarily liable for the existence of such contributions and for their appraised value.[7]

The law does not require a minimum capital, but it provides that the capital shall not exceed five million pesetas and must be completely subscribed and paid in;[8] in consequence, the principles of authorized capital and of partial payment of contributions are prohibited.

Each member may possess several shares, but if he desires to transfer them *inter vivos*, the remaining members have an option to buy them. This right of option may be stipulated in the articles so as to cover the case of transfer by hereditary succession.[9]

Decisions of the members are adopted in the general meeting (*junta*), but when the number of members does not exceed fifteen, such meeting is not obligatory, and votes can be taken by correspondence. In all cases, votes are adopted by a majority of a number of members representing more than one half of the capital,[10] but to modify the charter or bylaws a majority of two thirds is necessary.[11] In case of increase of capital, except when provision is

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[2] See Phanor J. Eder, 1 American Journal of Comparative Law (1952) p. 117 and 2 American Journal of Comparative Law (1953) p. 234.

[3] Published in the Boletín Oficial del Estado de 18 de Julio de 1953.

[4] This has been confirmed by a Decreto de 27 de Noviembre de 1953.

[5] Art. 5 of the law of 1953.

[6] Art. 1.

[7] Art. 9.

[8] Art. 3.

[9] Arts. 20 *et seq.*

[10] Arts. 14 *et seq.*

[11] Art. 17.

made to the contrary in the articles, members have a right of preference, and in case of reduction of capital, the law provides rules protecting creditors.[12]

The administration is entrusted to one or more "*administradores*" (directors) who are not required to be members. The directors are dismissed freely by a majority, except when they are designated in the articles, in which case the increased majority necessary to modify the charter is required.[13]

The law establishes the principle of equality between members; this is carried to the extreme, which seems to the writer inappropriate, of precluding any participation in benefits except in proportion to the respective shares.[14] The balance is succinctly regulated, rules being provided for valuation of the various types of assets.[15]

The law allows stipulation in the articles for accessory services distinct from the contributions,[16] a German formula little used in practice. But no provision has been made for a system of supervising the administration nor for the protection of minorities. It is interesting to observe that, among the causes of dissolution, no mention is made of the case in which all shares are combined in the hands of a single person, as a result of which it is lawful for the *sociedad* to continue in operation with a sole member.

The works and certain recent articles commenting on the new laws are listed below.[17]

F. DE SOLÁ CAÑIZARES*

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[12] Arts. 18 and 19.

[13] Arts. 11 *et seq.*

[14] Art. 29.

[15] Art. 28.

[16] Art. 10.

[17] Works: F. de Solá Cañizares, "Las Sociedades de Responsabilidad Limitada en el Nuevo Derecho Español," Editorial Revista de Derecho Privado (Madrid, 1954). P. S. Bullon and H. S. Bullon, Comentarios a la Ley de Sociedades Limitadas (1954) and R. Gay de Montellá, Comentarios de la Ley de Sociedades de Responsabilidad Limitada (Barcelona, 1954). Articles: J. M. Boix Raspall, "Ley sobre Régimen Jurídico de la Sociedad de Responsabilidad Limitada," Revista Jurídica de Cataluña (Barcelona, 1953) No. 6, p. 506. In the same number of this review, see other articles, by Mossa, p. 497; Gay de Montellá, p. 503; Bullon, p. 528; and Piñol Agulló, p. 525.

* Director of the Instituto de Derecho Comparado, Barcelona.

BOLIVIA: DECREE-LAW NO. 3464 ON AGRARIAN REFORM was promulgated on August 2, 1953. The extensive preamble recites the reasons which made the measure necessary, including the existence since colonial days of vast tracts (*latifundia*), the practice of personal services imposed on the Indians, a species of peonage, and financial penetration of imperialism. Among other data cited is the fact that 4½% of the rural owners hold 70% of the land.

The outstanding feature of the Bolivian agrarian reform is the distinction it makes between the different regions of the country,—the high plateaux, the valleys, and the sub-tropical zone. In prescribing the areas of the properties

affected, the density of population and the different kinds of farming have been taken into consideration.

The Decree-Law defines the various classes of landed property: property in the public domain, small private holdings, medium size private holdings, property of the Indian communities, co-operative agrarian property, agricultural enterprises and *latifundia*: the last are doomed to disappear. Sundry articles determine the maximum areas permitted for small and medium holdings, according to the various regions and the nature of the farming. The law also regulates the conditions for operation of agricultural enterprises, a mixed regime of share-croppers and wage laborers being permitted.

One of the purposes of the Decree-Law is the return to the Indian communities of lands which have been usurped since 1900. Within each community provision is made for family holdings.

Another fundamental part of the Decree-Law regulates the redistribution of lands subject to expropriation. The rural population working on the land is given a preference to acquire the grant, but a right is given to all Bolivians over 18 years of age, without distinction of sex, to apply for grants. The redistribution will be carried out by the National Service for Agrarian Reform, after study of the natural conditions of the land affected. The expropriated proprietors will be indemnified according to the valuation of their lands in the assessment roll by 25 year bonds bearing interest at the rate of 2% per annum; the farmer-beneficiaries will have the like term within which to pay for the land they receive.

The Decree-Law contains many other related provisions. Among them are some that attempt to correct the problem of infinitesimally small tracts (*minifundia*) which are found in some zones of Bolivia.

Decree No. 3471 of August 27, 1953, regulates the organization and operations of the National Service of Agrarian Reform.

It is too early to speculate on the practical results of this agrarian reform. Nevertheless, one thing stands out: the intensive study of social and agricultural realities that preceded the enactment of the Decree-Law. Although the revolutionary Government that came into power in 1952 proceeded immediately to nationalize the tin mines as it deemed such a measure urgent, the agrarian reform was dealt with at greater leisure and prudence and shows interesting gradations. The draftsmen were well aware of some of the errors that were committed in the Mexican redistribution of land and have attempted to avoid them.

It is within the realm of possibility that this Bolivian Decree-Law may serve as a legislative model for other Hispanic-American countries where similar conditions prevail in respect of lands and indigenous rural population.

JESUS DE GALINDEZ*

* Lecturer, Columbia University.

Digest of Foreign Law Cases

Special Editor: MARTIN DOMKE

American Foreign Law Association

Abbott Laboratories v. Bank of London and South America, Limited, 351 Ill. App. 227 (Ill. Oct. 6, 1953): Nicaraguan Commercial Code provisions on issuance of checks and liability; qualification of expert on foreign banking laws, customs and procedures.

Algazy v. Algazy, 131 N.Y.L.J., Jan. 6, 1954, 8 col. 1: separation action of Roumanian nationals residing in France; pendency of actions in French and Roumanian courts.

Alton v. Alton, 207 F. 2d 667 (3rd Cir. Oct. 15, 1953): legislative authority relating to divorce jurisdiction under Organic Act of Virgin Islands.

Archduke Franz Josef v. Princess Ileana of Romania, 282 App. Div. 1034, 126 N.Y.S. 2d 321 (1st Dept., Dec. 15, 1953): transactions in Austria between 1938 and 1946 to preserve assets from confiscation.

Bank of America Nat. Trust & Savings Assn. v. Liberty Nat. Bank & Trust Co. of Oklahoma City, 116 F. Supp. 233 (W.D. Okla., Oct. 17, 1953): issuance of letter of credit to a Swiss bank; improper payment by Swiss bank.

Bata v. Bata, 306 N.Y. 96, 175 N.E. 2d 672 (N.Y., Oct. 23, 1953): controversy between statutory heirs and half-brother of Czechoslovakian national as to possession of stock certificates.

Bennett, Estate of Maud G., 131 N.Y.L.J., Jan. 28, 1954, 8 col. 1: effect of revocation of letters of administration on assets in England.

Bernhardt, In re (B's) Estate, 126 N.Y.S. 2d 600 (Surr. Ct. Nov. 13, 1953): no recognition of Austrian decree declaring brother of deceased dead and without issue when obtained without due process to absentee (no notification to brother's heirs in Argentina).

Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij (Holland-America Line), 15 Fed. Rules Dec. 32 (S.D. N.Y. July 20, 1953): action of temporary receiver of assets of German corporation against Dutch corporation; production of documents; see also 15 F.R.D. 37 (S.D.N.Y. Sept. 14, 1953): examination of managing agent of foreign (Dutch) corporation; 117 F.Supp. 898 (S.D. N.Y. Dec. 9, 1953), and 210 F. 2d 375 (2d Cir. Feb. 5, 1954): supervening expression of executive policy on acts of officials of Nazi-Germany.

A. G. Bliss Co. v. United Carr Fastener Co. of Canada, Limited, 116 F. Supp. 291 (D. Mass. Nov. 18, 1953): action by Rhode Island corporation against Canadian corporation as wholly owned subsidiary of Massachusetts corporation.

Brownell v. Edmunds, 209 F. 2d 349 (4th Cir. Dec. 17, 1953): bequest to German legatees with provision not to take anything until the termination of the war, aff'g 110 F. Supp. 828.

Caldwell v. Carmar Trading Co., Limited, 116 F. Supp. 546 (D. Hawaii Nov. 16, 1953): repeal of Japanese civil law provisions on liability for wrongful death; United Nations Trusteeship over Island of Saipan.

L. D. Caulk Co. v. United States, 116 F. Supp. 835 (D. Del. Nov. 19, 1953): royalties of non-resident Swiss nationals; result of blocking regulations, Exec. Order No. 8785, on withholding taxes.

Chagi v. Chagi, 120 A.C.A. 29 (Cal. App. 2d Dist. Nov. 3, 1953): custody of children after Mexican divorce when wife left for Canal Zone and remarried.

City Bank Farmers Trust Company

(*Estate of Lillie Wehrle*) *v. Frauen Verein von Riegel*, Superior Ct. Fairfield County, Conn., No. 85101, Oct. 7, 1953: bequest for charitable corporation in Riegel, Germany.

Cohen v. Eschavarria, Cabo & Cia., Ltd., 130 N.Y.L.J. 1241, col. 3 (Sup. Ct. Nov. 27, 1953): examination of corporation of Republic of Colombia.

Commanding Officer U. S. Army Base, Camp Breckenridge, Ky. v. United States ex rel. Bumanis, 207 Fed. 2d 499 (6th Cir. Oct. 22, 1953): habeas corpus proceedings on behalf of citizen of Latvia who was allegedly unlawfully inducted into service in violation of Treaty between U. S. and Latvia, 45 Stat. 2641.

Cook, Matter of Edward T. C., deceased, 204 Misc. 704 (Surr. Ct. June 22, 1953): Cuban law on status of child as forced heir; Civil Code Cuba, art. 808.

Djurovic, Matter of, 131 N.Y.L.J., Feb. 5, 1954, 7 col. 8: custody of Yugoslav children.

Dorn v. Dorn, 130 N.Y.L.J. 1359 col. 1 (App. Div. 2d Dept. Dec. 8, 1953): effect of Mexican mail-order divorce.

Dresler v. Greeff, 282 App. Div. 455, 124 N.Y.S. 2d 412 (1st Dept. Oct. 6, 1953): disability of German enemy aliens under Trading with the Enemy Act; termination of war (House Joint Resolution 289, Oct. 19, 1951).

Ehag Eisenbahnwerte A. G. v. National Bank of Roumania, 306 N.Y. 342, 117 N.E. 2d 346 (N. Y. Jan. 14, 1954): aff'g 282 App. Div. 697, 121 N.Y.S. 2d 783: liability of bank for service of Kingdom of Roumania Loan of 1922.

Eisner v. United States, 22 U. S. Law Week 2327 (Ct. Cl Jan. 5, 1954): no compensation for losses on old bank accounts in Berlin, Germany, by reason of currency reform regulations issued by occupation authorities.

Estonian State Cargo & Passenger S. S. Line v. United States, 116 F. Supp. 447 (Ct. Cl. Dec. 1, 1953): action by nationalized Estonian steamship line to recover compensation for requisition of Estonian ship; non-recognition, by Executive Dept. of U. S. Govt., of Soviet Republic of Estonia and of its decrees.

Export Ins. Co. v. Skinner, 115 F. Supp. 154 (S.D.N.Y. June 5, 1953): action against Norwegian nationals for damage to shipment of cotton loaded in Peru for carriage to Japan.

Foundry Services, Inc. v. Beneflux Corp., 206 F. 2d 214 (2d Cir. July 14, 1953), reversing 110 F. Supp. 857: violation of anti-trust laws by wholly-owned subsidiary of English licensee-corporation.

F. A. R. Liquidating Corporation v. Brownell, 209 F. 2d 375 (3rd Cir. Jan. 13, 1954), reversing 110 F Supp. 580 (D. Del. 1953): issue of fact as to time when 1941 assignment of patents was sent from Germany.

First National Bank of Chicago v. Langhorst, Super. Ct. Cook County, Ill. No. 51 S 19664 (Nov. 25, 1953): German beneficiaries of American trust as co-defendants, in spite of their interests having been vested by Alien Property Custodian.

Frazier v. Foreign Bondholders Protective Council, Inc., 283 App. Div. 44, 125 N.Y.S. 2d 900 (1st Dept. Nov. 24, 1953): breach of contract of settlement agreement regarding Peruvian bonds (issue 1927); sovereign immunity from N.Y. jurisdiction.

Gibb v. Chisholm, 204 Misc. 892 (Sup. Ct. Nov. 17, 1953): no capacity of English executor for action in New York where ancillary executor as to New York assets was appointed.

Gdynia-America Shipping Lines, Limited v. Lambros Seaplane Base, Inc., 115 F. Supp. 796 (S.D. N.Y. July 15, 1953): seaplane in custody of H.M. Receiver of Wrecks, in accordance with British law.

Harvey Aluminum, Inc. v. American Cyanamid Co., 15 F.R.D. 14 (S.D. N.Y. Sept. 21, 1953): sale of assets of defendant's subsidiary corporation (Berbice Company, Limited) located in the Colony of British Guiana; consent of British Guianan Government for transfer to lessee; enjoining

purchasers from instituting action in British Guiana.

Hoven, Matter of Jan H., dec'd, 130 N.Y.L.J., 1613 col. 1 (Surr. Ct. Dec. 31, 1953): abandonment of domicile of origin by national of the Netherlands.

Hughes v. Kerfoot, 263 P. 2d 226 (Kan. Nov. 7, 1953): British subjects as aliens "ineligible to citizenship" within meaning of Kansas statute of 1925 regarding inheritance of real property.

I. v. I., 126 N.Y.S. 2d 844 (Sup. Ct. July 1, 1953): validity of marriage under Chinese law.

Indusco, In re, Inc., 15 F.R.D. 7 (S.D. N.Y. Sept. 24, 1953): fund-raising for benefit of Chinese Industrial Co-operatives; production of documents to Treasury Department as to transfer of funds to Communist China.

Kalabus, Estate of Michael, 130 N.Y.L.J., 1503, col. 6 (Surr. Ct. Dec. 18, 1953): Latvian law on inheritance per stirpes.

Kamaiel, Estate of Miriam Schnabel, 130 N.Y.L.J., 1051, col. 7 (Surr. Ct. Nov. 10, 1953): application of Czechoslovak General Civi Code, sec. 25 as to commorientes.

Komlos v. Compagnie Nationale Air France, 209 F. 2d 436 (2d Cir. Dec. 30, 1953), reversing 111 F. Supp. 393): application of Portuguese law to next of kin with respect to crash of airplane in Portugal while on flight from Paris to New York.

Koster v. Banco Minero de Bolivia, 131 N.Y.L.J., Feb. 2, 1954, 7 col. 1: immunity of Banco Minero de Bolivia denied; aff'd May 12, 1954, 8 col. 1 (App. Div. 1st Dept.).

Kovacs, Estate of Geza, 130 N.Y.L.J., 1531, col. 7 (Surr. Ct. Dec. 22, 1953): denial of motion for commission in Holland since "many competent experts on the law in question residing within the jurisdiction of the court" will afford to parties "effective examination and cross-examination."

Krachler, In re (K's) Estate. State Land Board of Oregon v. Brownell, 263 P. 2d 769 (Oregon, Nov. 12, 1953): existence on December 8, 1943 of reciprocal rights of American citizens in German estates.

La Greca v. Giaquinta, 131 N.Y.L.J., Jan. 13, 1954, 9, col. 8: letters rogatory for persons residing in Italy; deposition under control of Italian court.

Laird v. United States, 115 F. Supp. 931 (W.D. Wis. Oct. 31, 1953): timber leases issued by Ministers of Lands and Forests of Province of British Columbia, Canada; growing timber to be a portion of the realty under Canadian law.

Latvian State Cargo & Passenger S.S. Line v. United States, 116 F. Supp. 717 (Ct. Cl. Dec. 1, 1953): Latvian organization for operation of nationalized vessels has no title to vessel requisitioned in 1942 by U. S. authorities in New Jersey.

Lopez, Matter of Juan A., dec'd. 131 N.Y.L.J., Jan. 28, 1954, 10 col. 7: use of assets in Spain for satisfaction of foreign creditor of New York estate.

Mayer v. United States, 115 F. Supp. 171 (Ct. Cl. Oct. 6, 1953): confiscation of taxpayer's assets in Germany and Czechoslovakia not "other casualty" within meaning of 26U.S.C.A. § 23(e) (3).

Mazurowski, In re, 22 U. S. Law Week 2342 (Mass. Sup. Jud. Ct. Jan. 7, 1954): requirement of personal appearance of Polish national before probate judge not in conflict with 1933 Treaty between United States and Poland.

McGuckian, Matter of Mary, dec'd, 130 N.Y.L.J. 1456, col. 4 (Surr. Ct. Dec. 15, 1953): adoption under the law of Northern Ireland.

Meacham Corp. v. United States, 207 F. 2d 535 (4th Cir. Oct. 8, 1953): transfer of tanker to corporation controlled by Chinese nationals, in violation of Shipping Act.

Ollesheimer, In re (O's) Estate, 126 N.Y.S. 2d 477 (Surr. Ct. Nov. 6, 1953): bequest to Jewish societies (meanwhile dissolved) in Bavaria, Germany; right of Jewish Restitution Successor Organization to claim benefits.

People v. Dennis, 126 N.Y.S. 2d 710, aff'd 282 App. Div. 747, 122 N.Y.S. 2d 909 (2d Dept. June 29, 1953): convictions under Sections 303, 340, 457 and 459 of the Canadian Criminal Code.

Public Administrator of New York County (Estate of Freimanis) v. Brownell, 115 F. Supp. 139 (S.D. N.Y. Sept. 21, 1953): residence of distributees of Latvian origin during wartime in Germany or German-occupied Poland.

Republic of China v. National City Bank of New York, 208 F. 2d 627 (2d Cir. Dec. 8, 1953): treasury notes of foreign government payable in Shanghai, China; sovereign immunity with respect to counterclaim.

Roach v. Welles, 127 N.Y.S. 2d 138 (Sup. Ct. Jan. 18, 1954): payment for services of New York attorney in frozen foreign currency.

Rueff v. Brownell, 116 F. Supp. 298 (D. New Jersey Nov. 17, 1953): acquisition during minority of derivative German citizenship upon naturalization of her (American-born) mother as a German citizen.

Salamon, In re (S's) Will, 124 N.Y.S. 2d 610 (App. Div. 2d Dept. Oct. 13, 1953): no presumption of predecease of relatives residing in Russia in 1911.

Schwoerer, Estate of John, 131 N.Y.L.J., Jan. 21, 1954, 10 col. 2: beneficiaries in Russian-occupied zone of Germany.

Shaskus, Matter of Michael, dec'd, 131 N.Y.L.J., Jan. 5, 1954, 12 col. 2: objections by Consul General of Lithuania on behalf of national beneficiaries; Treaty with de jure government of Lithuania.

S.M.S. Industries, A.B. v. U.S.A.-European Mill Agencies, Inc., 130 N.Y.L.J. 1434, col. 8 (Sup. Ct. Dec. 14, 1953): Swedish law as to "collection of a just obligation."

Societe Internationale pour Participations Industrielles et Commerciales v. Brownell, 15 F.R.D. 83 (D. Col. Nov. 16, 1953): production of documents as required by Swiss Government; Swiss holding corporation's action to recover seized assets as enemy-tainted property; extension of time for further discovery.

Strasser, Matter of Kunigunde, dec'd, 130 N.Y.L.J., 1334, col. 3 (Surr. Ct. Dec. 4, 1953): deposit with City Treasurer of share of distributees residing in Russian Zone of occupied Germany.

Taterka v. Brownell, U. S. Dist. Ct. S.D.N.Y., Civil 85-31 Nov. 23, 1953: right of non-enemy stockholder to seized assets of enemy corporation.

Turney v. United States, 115 F. Sup. 457 (Ct. Cl. Sept. 13, 1953): taking compensation for property (radar equipment) through Philippine government's embargo upon exportation.

Uebersee Finanz-Korporation A.G. v. Brownell, 116 F. Supp. 145 (D. Col. Nov. 18, 1953): alien's wife as statutory receiver and sequestrator of alien's property not entitled to intervene in suit for recovery of property vested by Alien Property Custodian.

United States v. Quilop, 114 F. Supp. 862 (D. Guam, Sept. 17, 1953): prejudice existing upon part of Filipinos against the Chinese; Filipino laborer's pleading guilty to killing Chinese in Guam.

Wagner v. Derecktor, 306 N.Y. 386, 118 N.E. 2d 570 (N.Y. March 11, 1954): taking of judicial notice of applicable Mexican law on existence of embargo for the shipment of beef.

Wells, In re (W's) Estate, 126 N.Y.S. 2d 441 (Surr. Ct. Dec. 7, 1953): retention of funds of beneficiaries residing in Czechoslovakia and Hungary.

Western Reserve Life Ins. Co. v. Meadows, 261 S.W.2d 554 (Texas, Oct. 7, 1953), cert. den. 347 U.S. 928 (March 15, 1954): Korean conflict "war" within terms of life insurance policy.

Yasilonis, In re (Y's) Estate, 125 N.Y.S. 2d 363 (Surr. Ct. Nov. 9, 1953): residents of Lithuania as distributees of New York estate.

Zinser v. Kraus, 130 N.Y.L.J. 1032, col. 1 (Sup. Ct. Nov. 9, 1953): cause of action for defamatory utterance under the laws of Liechtenstein.

Book Reviews

Recent Literature on Jurisprudence

Jurisprudence, in the sense of legal philosophy, has a vital, if not always acknowledged, relation to comparative law. The latter, which in this respect resembles legal history, approaches the basic problems of law through comparison and analysis of legal phenomena; jurisprudence, as the term has come to be used in recent times, examines the logical and philosophical aspects of these phenomena, envisaged at higher levels of abstraction or in broader cultural perspectives. For comparative legal science, the critical or general constructions of theoretical jurisprudence, to the degree that they successfully interpret the ways of justice, are doubly significant, both to elucidate the nature of law and its more universal implications and as active elements, at times highly influential, of the legal system to which they relate. Indeed, these two disciplines are complementary: without comparative understanding of the life of law, jurisprudence seems an exotic and not always innocuous pastime; while without theoretical guidance and inspiration, comparison is doomed to blind repetition of detail.

For these reasons, attention has been given in this Journal, if necessarily in a limited way, to current developments in jurisprudence having comparative significance. The purpose of the present review is to give a summary account of various publications of interest in this field which have recently appeared but have not been noticed elsewhere in these columns.

I

Hamburger, M. *Morals and Law.* The Growth of Aristotle's Legal Theory. New Haven: Yale University Press, 1951. Pp. xxii, 191.

Bentham's Handbook of Political Fallacies. Revised. Edited and with a Preface by Harold A. Larrabee. Baltimore: The Johns Hopkins Press, 1952. Pp. xxxii, 269.

Jurisprudence in Action. A Pleader's Anthology. With a Foreword by Honorable Robert H. Jackson. New York: Baker, Voorhis & Co., Inc., 1953. Pp. xii, 494.

Berle, A. A., Jr. *Natural Selection of Political Forces.* Lawrence, Kansas: University of Kansas Press, 1950, Pp. 103.

Patterson, E. W. *Jurisprudence: Men and Ideas of the Law.* Brooklyn: The Foundation Press, Inc., 1953. Pp. xiii, 649.

In the United States, the outlook of general legal theory, as contrasted with that of positive law, is essentially cosmopolitan. In large part, except perhaps for the contributions of legal realism, the literature of jurisprudence in this country in recent years has mirrored the European scene. This responsiveness to current legal theories developed abroad has been assisted by numerous

translations of leading foreign works, as in the Twentieth-Century Legal Philosophy series; it has been conspicuously promoted by the prevailing eclectic doctrines, notably of sociological jurisprudence; and in recent years it has been stimulated by the presence of Kelsen, Recasens-Siches, Barna Horvath, and many other eminent European jurists who in America contribute to the development of Western legal culture, free from totalitarian thought-controls. In consequence, this literature presents a complex spectrum of ideas, ranging from fragmented behaviorism to neo-scholastic rationalism, in which diversified theories are, if not synthesized, at least duly reflected.

A situation of this nature invites synopsis. In this light, the analysis of the *Growth of Aristotle's Legal Theory* in the scholarly study by the author of *The Awakening of Western Legal Thought*[1] is of interest. In essence, this work presents an internal comparison of the three chief ethical treatises in the *Corpus Aristotelicum—The Nicomachean Ethics*, *Eudemian Ethics*, and the *Magna Moralia* or *Great Ethics*—demonstrating the progress in Aristotle's sociological and legal thinking from the last of these works to its final formulation in the *Nicomachean Ethics*. The effect is to refute the supposition of Jaeger and others that the *Magna Moralia* is a later spurious version of Aristotle's teaching.

While this work most immediately concerns students of Aristotle and ancient philosophy, the exposition of Aristotle's views on law is of much wider interest. These are considered under three parts: I. Voluntary Action and Choice (Theory of Culpability); II. On Law and Justice, in which general and particular justice, the individualization of law and, finally, equity are treated; III. On Friendship (*Philia*) in which community, partnership, and contract, was well as the problem of slavery, are examined. As the author suggests, these doctrines were taken over by leading Roman jurisconsults and thus became embodied in the classical Roman law. In an instructive foreword, Huntington Cairns points out that to avoid foundering in its own detail, empiricism in the social sciences has become aware of the need for general principles to give meaning to its data; even jurisprudence, which until recently has seemed self-sufficient, is being forced back to Aristotle, to a reinterpretation of law in terms taking account of other affairs of life, such as were developed in classical Greek philosophy.

It is not without interest that *Bentham's Handbook of Political Fallacies*, written by one of the master architects of empirical jurisprudence, which is now published in a revised edition with a foreword by the editor summarizing Bentham's life and purpose in this work, starts from Aristotle. The pungent analysis of the fallacies of authority, danger, delay, and confusion, presented in this portrayal of the "sinister interest," to which Bentham attributed the most common solecisms in political thinking is of perennial significance. In another venture in republication, *Jurisprudence in Action*, a committee of the Association of the Bar of the City of New York has sought to provide an anthology of

[1] M. Hamburger, The Awakening of Western Legal Thought. London (1942).

the best legal writing. It includes a variety of distinguished essays by seventeen outstanding legal scholars and judges of recent years in America and England, prefaced by useful brief notices of the respective authors.

In this connection, reference should be made to the lectures by Adolf Berle, Jr. on *Natural Selection of Political Forces*, which look to techniques developed in biological science to discover the principles of a universal order in the contemporary scene, instead of the chaos that Henry James in 1909 predicted the machine age would produce by 1953 (p. 9). The hypothesis persuasively advanced is that history is an evolution of political forces—ideals implemented by apparatus of power—according to natural laws of selection. These laws favor "good" political forces, i.e., universal conceptions that give human individuals a sense of harmony in the general pattern and impose responsible restraints upon the apparatus, curbing the incurable tendency of power to deny the purpose for which it is created. This historical perspective underscores the significance of the choice which is now compelled between liberal democracy and "the collection of Stalinist negatives," which appear to the author "a plain path to destruction."

Professor Patterson's *Jurisprudence: Men and Ideas of the Law* is a welcome addition to the very few textbooks on jurisprudence in the United States; it embodies the results of the author's instruction in the required course in this subject at Columbia since 1938. Avowedly eclectic, the viewpoint adopted is that of an axiological realist, leaning toward Dewey's instrumental logic and Pound's analysis of social interests, who at the same time espouses the imperative conception of law as a body of legal norms sanctioned by the state.

Defining jurisprudence as consisting of the "general theories of, or about, law," after a preliminary part surveying the meanings of jurisprudence and its relations to philosophy and to other social sciences, three central questions are examined: What is Law?; What is the Law?; and What should be the Law? A final chapter on the Judicial Process, a table of cases, a useful bibliography, and an index conclude the volume. The principal themes of the work are thus the general theories *about* law: its basic characterizations, its dominant features—generality, normativity, authority—and the chief schools of legal philosophy, ranging from that of natural law to legal realism, with which last the author evinces qualified sympathy. On the other hand, the general theories *of* law, the basic concepts of legal analysis, form a sort of substratum; while the countervailing considerations on points discussed are faithfully set out as a rule, the interesting and often essential critical literature is kept *sub rosa*.

Subject to the foregoing qualification, the work typically reflects the essential eclecticism of current American legal thinking, combining Hohfeldian interest in legal analysis, Pound's sociological engineering in terms of classified social interests, with an authoritarian conception of law, conceived in pragmatic terms. The avowed limitation of the subject matter to the general juristic theories influential in the contemporary American scene—which apparently supposes that jurisprudence can thus be nationalized—reduces somewhat the

comparative value of the presentation, but only in a moderate degree, since account is necessarily taken, especially in the survey of legal philosophies, of the principal European as well as American writers on jurisprudence.

II

HART, H. L. A. *Definition & Theory in Jurisprudence.* An Inaugural Lecture delivered before the University of Oxford on 30 May 1953. Oxford: at the Clarendon Press, 1953. Pp. 28.

ALLEN, C. K. *Law in the Making.* Fifth edition. Oxford: at the Clarendon Press, 1951, Pp. xxxii, 626.

PATON, G. W. *A Text-book of Jurisprudence.* Oxford: at the Clarendon Press, 1951. Pp. xiii, 527.

STONE, J. *The Province and Function of Law.* Law as Logic, Justice and Social Control. A Study in Jurisprudence. Second printing. Cambridge, Massachusetts: Harvard University Press, 1950. Pp. xi, 918.

POTTER, H. *The Quest of Justice.* London: Sweet & Maxwell Limited, 1951. Pp. ix, 88.

GOODHART, A. L. *English Law and the Moral Law.* The Hamlyn Lectures. Fourth series. London: Stevens & Sons Limited, 1953. Pp. x, 151.

DENNING, A. *The Changing Law.* London: Stevens & Sons limited, 1953. Pp. viii, 122.

The Reform of the Law. Edited by Glanville Williams. London: Victor Gollancz Ltd., 1951. Pp. 224.

KEETON, G. W. *The Passing of Parliament.* London: Ernest Benn Limited, 1952. Pp. vii, 208.

In Great Britain, the active interest in legal philosophy and jurisprudence, reflected in the appearance in recent times of a number of outstanding works, has recently been surveyed in this Journal.[2] Hence, what follows is by way of addendum, to note later publications of juristic interest, including certain related works primarily concerned with legal reform. These suggest that the continued pursuit of formal legal analysis is, in Great Britain, counterbalanced by emphasis upon the broader social and moral aspects of law and constructive efforts in the Benthamite tradition to improve the administration of justice.

The former trend is exemplified by H. L. A. Hart's inaugural lecture on *Definition & Theory in Jurisprudence.*[3] In this, attention is directed to the difficulties of definition with which analytical jurisprudence is specifically concerned, and a radical solution is proposed. This is that the traditional method of defining such terms as "law," "right," "state," as individual expressions by synonyms, is unilluminating or even fallacious; the use of language relating to rules of conduct indicates that a term of this nature can be properly defined only in its context—as part of a proposition implying a system of rules and

[2] Hart, "Philosophy of Law and Jurisprudence in Britain (1945–1952)," 2 Am. Jour. Comp. L. (1952) 352–364.

[3] Reprinted in 70 Law Quarterly Review (1954) 37.

stating a conclusion in accordance therewith. Legal concepts, accordingly, are not empirically derived prophecies about litigation à la Holmes, nor Hägerströmian fictions, nor the invisible entities of traditional jurisprudence. Instead, it is conceived that "legal notions can be elucidated by methods properly adapted to their special character"—without entering "a forbidding jungle of philosophical argument." This instructive critique has the virtue of concentrating analysis upon the actual legal rules instead of the supposed substances embodied in isolated terms; beyond lies the whole area of the social and ethical context and significance of law.

This area, however, as well as the formal aspects of jurisprudence is amply considered in a variety of British texts, the excellence of which is attested by new editions. First among these is Allen's classic *Law in the Making*. The author's pleased surprise, as intimated in the preface, at the longevity of this work, now in the fifth edition, can only be described as unduly modest. It provides a comprehensive historico-comparative study, distinguished in substance and in style, of the nature, origin, and operation of custom, precedent, equity, and legislation, autonomic and subordinate, as sources of law. This is prefaced by an illuminating review of the principal legal philosophies to show that the sources of law should not be presumed to derive from a single origin, such as the sovereign power, which is part, not the cause, of law. This position is essentially sympathetic with that of Roscoe Pound; it imports the rejection of more restricted doctrines, notably those of legal realism, which, narrowly identified as a dogma of uncertainty, is pitilessly pilloried, and of the "pure" law doctrine, which is subjected to more understanding and penetrating criticism. The present edition, preserving the essential features of the work, has been revised throughout, the chapters on the authority of precedent and on subordinate legislation in particular having been largely rewritten.

In addition, there are new printings of two more recent texts of recognized merit. The one, Paton's *Text-book of Jurisprudence*, specifically prepared for undergraduate study and written in clear and incisive style, provides a well-balanced treatment in 500 pages of the principal topics which are traditionally included under jurisprudence—the nature of jurisprudence and law; the purpose, sources, and technique of law; and the chief concepts of public and private law. Essentially, as the author notes, much of the work deals with legal problems on an analytical basis, but with consideration of the present-day function of legal concepts to offset logical theory. From this point of view, the analysis of the principal doctrines of public and private law in the last two hundred pages is especially valuable, as well as the sympathetic but judicious account given of the functional and realist theories of law and of the jurisprudence of interests in earlier chapters. In this new edition, a number of sections have been added, others recast, and the analysis of law on the basis of interests entirely rewritten so as to link this with historic natural law as the two approaches to the problem of teleology (p. v).

On the other hand, in Stone's *The Province and Function of Law*, which has

been reissued in a second printing, the emphasis is societal. In the systematic exposé of the logical, philosophical, and sociological doctrines relative to law provided in this treatise, the third of these parts, devoted to the nature of sociological jurisprudence, social and legal types, the various interests with which law is concerned, and the social factors involved in legal stability and change, occupies well over half the volume. This massive work is the outstanding available text of sociological jurisprudence; indeed, the author avows his "greatest single debt" to Roscoe Pound. It is a most useful contribution, not merely for the elaborate summaries of the wide subject matter included but more particularly for the exhaustive references to the prolific literature.

On the background of the foregoing treatises, which give to jurisprudence in Great Britain a broad historical and social perspective, two trends, not unrelated, merit special mention. The first is a revived interest in natural law, evinced, for example, in A. H. Campbell's edition of del Vecchio's *Justice*, to which reference is made below. The same theme, but with specific reference to the evolution of English law, engrosses the lectures of the late Harold Potter on *The Quest of Justice*, a quest that includes two problems: to find just rules and to apply them justly (p. 9). The solutions of these problems in the Common Law are traced in four "episodes:" the dawn of the conception of government by law in the twelfth and thirteenth centuries; the discretionary application of law as divine inspiration in the fifteenth and sixteenth; the rationalization of the rules of law in the eighteenth; and the modern era of justice by statute law.

Likewise, A. L. Goodhart's Hamlyn Lectures on *English Law and the Moral Law* underscore the central significance of the relation of law to justice. The basic conflict between the Western idea of life and that which has been dominant in totalitarian states, it is observed, concerns the nature and end of law, whether it is to be regarded as an expression of power of and for the ruling class or as a common law of self-government, individual freedom, and justice. In effect, the lectures form two parts: a magistral analysis of "The Nature of Law and of Morals" in the first lecture, and its elaboration in reference to the various branches of English law in the succeeding three lectures.

The argument in the first lecture develops the definition of law as "a rule of conduct which is recognized as being obligatory" (p. 37). Sophist conceptions of law as power are shown to be inadequate: in particular, the *command* theory is obsolete for modern states which have no identifiable commander and fails to explain basic types of law, constitutional, international, religious, and customary; the *sanction* theory, popularized by Kelsen, blandly assumes a constitutional *Grundnorm* as the source of law, ascribes nominal significance to its own criterion of law—the sanction—and is unable to distinguish a coercive from an obligatory order. As the author remarks, law is sanctioned because it is recognized as binding; the sanction does not create the obligation. What then is the source of this recognition of obligation, characteristic of law? There are various grounds: "the general law conviction," which the author, citing Hägerström, regards as of first importance, reverence for social institu-

tions, the feeling that law is essential to avoid anarchy, and recognition of a moral duty to obey the rule, whether simply because it is a law issued by the Government or is recognized to be intrinsically just. Natural law, which the author terms "moral law" to avoid misconception, thus forms an essential basis of the legal system—not in a subjective sense but as an objective order of moral judgments, derived from religion, intuition, or reason.

This provides a touchstone to distinguish law from tyranny. The elaboration of the argument in the latter part of the book is instructive. The constitutional limitation of power in modern democracies is justified, there being no need to premise a sovereign power as the basis of law; the weakness of international law is due, not to want of an effective sanction, but to a moral weakness in the world itself. After pointing to legislation, judicial law-making, and even legal terms, such as the "reasonable man," as contacts by which moral ideas are incorporated in law, the concluding two lectures provide an illuminating survey of the extent to which the several branches of English law are governed by moral principles.

The second and related trend in the British scene is inspired by the active interest in legal reform; this is, as it were, the practical face of natural law theories. This animates Lord Justice Denning's brief but enlightening lectures on *The Changing Law*, in which the basic conditions of the rule of law, fundamental in the British constitution,[4] are emphasized and account is given of the measures taken to maintain the supremacy of law in "the new social order which is called the Welfare State." These lectures also give an authoritative and instructive survey of recent changes in private law, including many developments of great interest respecting rent restriction, contracts, restitution, torts, equity, etc., as well as of the position of women and the basic influence of religion, in the law of England.

As the title indicates, the recent book skilfully edited by Glanville Williams, *The Reform of the Law*, is even more directly concerned with improvement of English law. As stated in the preface, the central proposal of the book, which was prepared by a group of over twenty members of the Haldane Society and others as a contribution towards the development of the law, is "the establishment of a Ministry of Justice to exercise a constant surveillance over the substance and the machinery of the law." The principal grounds for this forward-looking proposal, recalling that advanced a generation ago in Cardozo's celebrated article[5] anticipating the establishment of the New York Law Revision Commission, are, first, the need to keep the law up to date and the inadequacy of the existing, dispersed arrangements in England to do so, and, second, the complex problem of making law known to the people, which calls for codification of the law and its progressive amendment in response to new conditions. In support of this proposal, advanced in the first chapter, the following eleven

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[4] See especially Lord Justice Denning's Hamlyn Lectures, Freedom Under the Law (1949).
[5] "A Ministry of Justice," 35 Harv. L. Rev. (1921) 113.

chapters constitute, as the editor justly notes, the most comprehensive survey of the anomalies in English law yet attempted (p. 216). This covers judicial administration, including the legal profession, constitutional and administrative law, civil liberties, contract and tort law, industrial law, property and leaseholds, family law, criminal law, revenue law, and legal education. The work thus sets forth in instructive but concise detail, notably with respect to the housing laws and criminal justice, an impressive program of legal reform. As many of the problems considered are paralleled in the United States and other countries, this cogent critique of the contemporary administration of justice in a major legal system deserves wide attention by legislators, lawyers, and indeed all concerned in the improvement of law.

The central problem of legal reform, in Great Britain at least, appears to concern the constitution itself. In *The Passing of Parliament*, the latest contribution to the discussion started by Lord Hewart in 1929 with the publication of *The New Despotism*, G. W. Keeton defines the problem as "the difficulty of maintaining either any constitutional system in the real sense of the word, or any security, either of person or property, in face of the continual and relentless encroachments of the executive" (p. 185). After referring to the intervening literature and indicating that the essential features of state socialism as exhibited in the Soviet system are (1) a single party, (2) an all-powerful executive, and (3) a planned economy, in which significant activities are government monopolies under executive control, the author portrays the distance to which Great Britain has "stumbled" on the road to Moscow. He shows that the same issues are at stake as were in issue with the Stuarts in the seventeenth century, namely, whether the King, as executive, has legislative power independent of Parliament and whether the common law governs all causes and all men or, in other words, whether there is an independent "administrative justice," dispensed by the executive. The decline in the importance of individual members of Parliament, the extraordinary extension of independent delegated legislation by the departments, the confused proliferation of administrative tribunals with inadequate procedures, the limited extent of judicial control of the administration, the portentous inroads upon private enterprise through the voracious growth of taxes to support increased official interventionism, the "land in chains" of a new feudalism forged by agricultural controls, the recent creation of state monopolies increasing the sphere of departmental irresponsibility—these, as here exposed, are significant phases of the enlargement of executive government, which has brought Great Britain to what the author denominates "the edge of dictatorship."

III

SCHINDLER, D. *Recht: Staat: Völkergemeinschaft.* Ausgewählte Schriften und Fragmente aus dem Nachlass. Zürich: Schulthess & Co. AG., 1948. Pp. 376.

KRANENBURG, R. *Studiën over Recht en Staat.* Vierde druk. Haarlem: De Erven F. Bohn N.V., 1953. Pp. 411.

COING, H. *Grundzüge der Rechtsphilosophie.* Berlin: Walter de Gruyter & Co., 1950. Pp. xi, 302.

DEL VECCHIO, G. *Justice.* An Historical and Philosophical Essay. Edited with additional notes by A. H. Campbell. New York: Philosophical Library, 1953. Pp. xxi, 236.

DEL VECCHIO, G. *Philosophie du Droit.* Traduction par J. Alexis D'Aynec. (Collection "Philosophie du Droit".) Paris: Librairie Dalloz, 1953.

DABIN, J. *Théorie Générale du Droit.* Deuxième édition revue et corrigée. Bruxelles: Établissements Émile Bruylant, 1953. Pp. 325.

Archives de Philosophie du Droit. Nouvelle Serie. *La Distinction du Droit Privé et du Droit Public et l'Entreprise Publique.* Paris: Librairie du Recueil Sirey, 1952. Pp. 246.

SAVATIER, R. *Les Métamorphoses économiques et sociales du Droit Civil d'aujourd'hui.* 2d ed. Paris: Librairie Dalloz, 1952, Pp. 314.

Across the Channel, the assault on the bastions of positivism in legal thinking, as measured by the Anglo-American position, is well advanced. In comparison with the Common Law, centered in the formless system of judicial precedents, largely unconcerned with the burning issues of social reform, which must be resolved by legislation, the codified Civil Law of Western Europe is cast in relatively formal, abstract molds, for the most part dated long ago; to meet the needs of the present century, these have had to be freely interpreted, or even amended by legislation, on grounds transcending their original intendment. This situation has necessarily precipitated the issue of legal positivism in a manner which the inherently pragmatic tradition of the Common Law has scarcely sensed; the latter, as the adjustment of contemporary English law to the Welfare State illustrates, is able to accept a remarkable amount of variation in the conditions with which it has to deal, without disturbing alterations in its form, administration, or basic principles. In effect, what might seem in the sphere of the Common Law as in ancient Rome a somewhat esoteric discipline, outside the main path of social change, is on the Continent a central concern. There the primary function of jurisprudence for centuries has been to interpret and refine the Roman and later legal doctrines in the light of current needs; with the modern codes, it has become an essential means to reform the positive law.

This technical necessity has been powerfully reinforced by external conditions. Of these, the most fundamental is doubtless the increasingly felt need of reform in modern times, a movement which has been intensified in Western Europe, if only because there, despite the advance of scientific techniques, it is thwarted by a myriad traditions and persistently betrayed by divisive political crosscurrents. The European Continent, which has been the citadel of Western culture, is also the epicenter of social change, revolution, and war. In consequence, especially since the first World War, there has been a growing disposition to look beyond the existing institutions for means of adjustment. This, it may be observed, has occurred on both sides of the Iron Curtain. Liberalism

and Marxism alike profess to seek the greatest good for the greatest number, the former by promoting the free development of individual initiative, the latter by positing a materialistic dialectic of socio-economic evolution, in which state and law are a temporary superstructure and the individual a statistical item. The communist tragedy is of course that the dialectic, formulated a century ago in the style of now discarded scientific notions, has not been realized. The bourgeois utopia of liberalism has not suffered its predicted collapse, but on the contrary is very much alive—witness the remarkable recovery of Western Germany in recent years—while the Communist experiment itself appears to misfire. The Marxist utopia of peace and plenty for the toilers in a classless society very soon in the Russian Revolution became a program of class warfare, enforced by bureaucratic control and the dictatorship of the proletariat, principles which now bear their bitter fruit. The Communist political apparatus, which was supposed to "wither" away, suffers from aggravated bureaucratic gigantiosis; after a generation of untold sacrifice by the toilers to ensure the predestined progress of the dialectic, the end in view increasingly resembles an ancient evil—the menace of totalitarian imperialism. These conditions, and certainly not least the disillusionment attendant upon the failure, after two exhausting wars, of political ideologies and many expedients to establish order in a better world, are of profound significance for contemporary legal theory. They inspire the renewed interest in natural law conceptions, the search for some objective basis on which to predicate reform.

This concern is typically reflected in the works listed above, notably in the distinguished collection of papers, in part hitherto unpublished, by the late Dietrich Schindler, whose untimely death early in 1948 cut short the career of this gifted jurist and cultured student of public affairs. As the title, *Recht: Staat: Völkergemeinschaft*, suggests, the contents respectively relate to the bases of law, law and politics, international law. The inaugural lecture (1928), with which the volume opens, in effect sets the stage for subsequent papers. Seeking the objective basis of law, this lecture constitutes an illuminating survey of current juristic theories, in which positivistic doctrines (Laband, Jellinek), more recent psychological (Krabbe) and sociological (Duguit, Politis) conceptions, the pure law theory (Kelsen), and formal axiologies (Stammler, Burckhardt) are subjected to penetrating critique, justifying the conclusion that the legal order presupposes a source beyond itself, which is the conception of justice (*Rechtsidee*). This viewpoint, it may be noted incidentally, was developed in greater detail in the work first published in 1931, *Verfassungsrecht und soziale Struktur* (2d ed. 1944), in which, rejecting "one-dimensional legal theories," the consequently necessary dialectical method is applied to law.

In this view, the essential function of law is to realize values; hence, it cannot be explained by ignoring its ideal purpose—this is the fatal fault of positivism—nor by doctrines that locate the basis of law either in facts alone, as do the psychological and sociological theories, or exclusively in some level of abstraction from the real world, whether a formal ethic or a pure logic of normative hypo-

thesis. This concept of law as both ideal and real recalls the natural law systems of the 17th and 18th centuries, but with a vital difference; law, like language, may take a variety of forms to express meanings, for which reason there can be no a priori system of natural law rules, as was formerly supposed. The constitutive element in law is the transcendental idea of justice, developed in the classical-Christian tradition, which underlies the variety of positive laws. There is a basic antinomy resulting from the fact that in modern times the state has monopolized, and therefore restricts, the realization of justice by law. This antinomy cannot be resolved by monistic theories, whether of power or ideal purpose; the court of last resort in theory is the idea of justice, in practice the state.

This humane and at the same time realistic exposition of the nature of law as both actual and spiritual in reference, which, without lapsing into eclectic confusion, avoids inadequate formalism and hypothetical logic, is followed by papers indicating the relations of law to the university of science and to religion and emphasizing the insufficiency of relativism as in the doctrines of Kelsen and Radbruch, which leave the substance of law a void ready to be filled by dangerous ideologies. Of particular interest are the fragments of a projected work on the Reconstruction of the Legal Order (*Zum Wiederaufbau der Rechtsordnung*), setting forth the mature observations of the author on law as realization of values, the interrelation of philosophical systems and facts, and especially the necessary conditions of legislation, which are ignored in the common view that the content of law is subject to free legislative determination. These conditions, explained in terms of Hartmann's conception of the levels of existence—material, organic, and spiritual—are substantiated by an acute analysis of social groups as either basic communities, such as the family, or organizations for some specific purpose; rules relating to the basic social formations are predetermined and can only be stated by law, whereas there is greater scope for creative legislation in dealing with corporations or other purposive formations.

The remainder of the volume is of primary interest from the viewpoint of public and international law; the second part contains papers on the equality of the Swiss cantons and other principles of the Swiss political tradition, government by law (*Rechtsstaat*), the psychological bases of the modern state, Christianity in relation to the state, freedom as the complement of a just political order. The third part is devoted to the critical problems of international law, problems that, as the author's observations on the reconstruction of international law conclude, must depend for their solution, formally speaking, upon control of power politics and extension of law to now lawless relations, but, in substance, upon realization of human values founded in the claims of individuals. Other essays stress the difficulties under present conditions precluding the establishment of an effective international order with "good laws" and "good weapons," the special problems of Swiss neutrality in relation to freedom of the press, the similarity of international law and labor law, as systems in the

process of development, the limitations upon arbitration as an appropriate means to preserve international peace, and the notable contributions of Switzerland in the field of international arbitration. Throughout these are contributions of a high order, directed to the central problems of legal philosophy and international organization today, which reflect the sensitive, if somewhat disillusioned, humanitarianism of a jurist who premises that the function of law is to do justice.

The conception that the criterion of law is justice, but in an empirically ascertained rather than a transcendental sense, also is the basis of the works of an outstanding jurist in the Netherlands, R. Kranenburg, whose *Studiën over Recht en Staat* have recently appeared in the fourth edition. As indicated in the preface, all these studies, of which those on Troelstra and on the League and the United Nations are new, deal with the fascinating problem of the formation of law, and all have a common philosophical basis. This basis, as developed in other works by the author, especially *Positief Recht en Rechtsbewustzijn* (2nd edition, 1928) and *De Grondslagen der Rechtswetenschap* (4th edition, 1952), is in effect the Kantian theory of practical reason; the foundation of law is the sense of justice (*rechtsbewustzijn*), a conception previously developed by Krabbe.[6] This, according to the author, is a synthetic a priori category, inherent in human thought and discoverable through application to existent laws of what the author terms the empirical-analytical method, or in other words the method employed in other branches of science to discover general principles in observed phenomena. Against the common objections to the use of this method in the field of law, viz., that legal ideas and institutions are variable and that it is not possible to derive normative values from facts, it is pointed out that positive laws must necessarily vary under differing conditions and that they express evaluations. On this hypothesis, an historico-analytical survey of the principal branches of law—property, contract, delict, marriage, and corporative law—indicates that the principle of reciprocity (*evenredigsheid*) is a common norm of legal thinking, just as the principle of contradiction is assumed in logical thinking. This principle of justice, it is observed, embraces the conceptions of commutative and distributive justice, the relations of which were not fully defined by Aristotle.

As the first of the *Studiën* proposes, this conception gives an objective psychological basis for the study of law and the state. There follows a suggestive analysis of the psychology of groups, classified in four types accordingly as the group of individuals is assembled or dispersed, organized or disorganized. Eight succeeding studies are devoted to the psychology of the statesman, to the character and contributions of leading figures in the constitutional development of the Netherlands—William of Orange, Oldenbarnevelt, Jan de Witt, Thorbeke, and Troelstra—to Gladstone and Ireland, and to the formation of the United States Constitution, notably with reference to Alexander Hamilton.

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[6] H. Krabbe, Die Lehre der Rechtssouveränität (1906); *id.*, De Moderne Staatsidee (1915).

Additional studies deal with related questions of legal philosophy, exhibiting the inadequacy of positivism, scepticism, or relativism as sources to guide the specialized branches of law, the difficulties presented by traditional theories of statutory interpretation on account of the failure to establish their correlations, and the relations between fact and norm. In connection with the last of these topics, it is observed that the confusion of the factual and the lawful, as for example in traditional ideas of sovereignty and in sociological jurisprudence, has been clarified notably by Stammler's distinction between mere fact and recognized right; Stammler's works, however, commit the error of presenting a jurisprudence of method without reference to content as the basis of law. The concluding studies, which are of more local or occasional interest, concern the problems of delegated legislation in labor law, state liability for unlawful official acts, democracy and international law, and the organization of the international community.

The two preceding works, formulating views developed shortly after the first World War and representing two traditionally liberal crossroads of European culture, Switzerland and the Netherlands, both seek, if in different ways, an objective criterion of positive law. It is of interest that also in Germany, a generation later, the ethical and factual conditions of the legal order are emphasized in the writings of Helmut Coing. While an earlier publication, *Die obersten Grundsätze des Rechts* (1947), avowedly proposed a scheme of ethical values expressed in fundamental principles of justice as constituting natural law, his more recent text on the elements of jurisprudence, *Grundzüge der Rechtsphilosophie* (1950), apparently qualifies this conception as part of an eclectic synthesis of various current trends in philosophy and social science. In this, law is conceived as a *Befehlsordnung*, an imperative order of social relations: ideal, since these relations are not spatial; opposed to change, since the primary purpose of law is peace and security; abstract, since it applies not to concrete, but to typical, social phenomena; indeterminate, since it is created by human will. Law is neither fact nor value, but its validity in the last analysis depends upon conformity with ethical norms, its effectiveness upon social recognition. In this composite definition, it would seem—to employ the distinction made by Verdross[7]—that law has the qualities both of authoritative will, which pertains neither to the world of "dead" nature nor to the realm of spiritual value, and yet also of reason, being effectually subject to the limitations, natural and ethical, imposed by these spheres of being.

This restores to jurisprudence what "pure" law theories would put away; the center of attention is shifted from formal analysis of positive law to a survey of the psychological, social, and ethical formations by which it is conditioned. The work accordingly contains three parts: the first considering law as a phenomenon of social life; the second concerning the natural, viz., moral, laws governing the subject matter to which the legal order relates; the third

[7] Verdross, "Zur Klärung des Rechtsbegriffes," 72 Juristische Blätter (1950) 97.

treating positive law and legal science. These are supplemented by an introduction on the relations of jurisprudence to legal science and philosophy generally and brief critical appendices on the theories of Kelsen and Stammler and the "free law" doctrine, as well as an index and a selective bibliography.

In the first part, after defining law as above indicated and establishing the significant purposes of the legal order—security and peace, justice, equality and freedom—the psychological nature of individuals and groups is analyzed and the various social types, following Vierkandt's classification of community, associative, power, and hostile relations, are reviewed in relation to law. The second part is concerned with the problem whether the ends and the circumstances to which the legal order is bound are controlled by natural laws, or in other words whether the human will is free in legislation or is subject to moral principles. After pointing out that the idea of justice needs to be made specific to serve as a criterion, the author reviews various "nihilistic" (Thrasymachos, Kelsen, Marx), "reductionist" (Spencer, Nietzsche, Freud), "factual" (Jellinek) theories, exhibiting their one-sided simplicity, as well as relativistic (Kant, Max Weber, Radbruch, Riezler) doctrines, which deny the existence of ascertainable, objective ethical principles, showing not only that social relations would be impossible without a common understanding of moral values but also that these can be ascertained by what Dilthey has termed "analysis of the moral consciousness." In this manner, the idea of justice, combining the principles of equality and equity, is defined in individual cases by the social and economic situation, the *Natur der Sache*; thus the social order contains a natural law, composed of basic principles of justice, which establish fundamental human rights, and condition the political and economic, as well as the legal, order. The third part is concerned with the sources of law, their validity, whether statutory or customary, being derived primarily from recognition and ultimately, as Klein has shown, from the moral conceptions of the group, which also lie at the base of the "sense of justice;" attention is also given in this part to the related problems arising in the judicial process and in connection with legal science, which, concerned with positive law, typically employs systematic or empirical methods in treating situations the analysis of which has been clarified by the theory of interests.

This analysis is symptomatic not only as confirming the modern trend towards natural law, thus diverting the positivistic Laband-Stammler-Kelsen-Radbruch tradition, but notably also as a comprehensive effort to integrate jurisprudence with current philosophical, psychological, and sociological doctrines. The accent upon fundamental principles of justice resembles conceptions which have been long and generally held in Anglo-American jurisdictions, but with a significant difference. These principles, here regarded as the very essence of the Common Law, appear to Coing external to the legal order, the prime purpose of which is to preserve peace, which is not necessarily synonymous with justice. Hence, the concern of legal science is with the positive law. Like Hobbes, also speaking from troubled times, the author wants security and accordingly

defines law as an imperative expression of group will, which is to say the command of Leviathan. Thus the lesson of recent history is not to abandon the nominalistic tradition of German legal theory but to ascertain the conditions under which the legal order can be successfully maintained, of which the most important is a certain conformity to natural law. It is an ancient autocratic doctrine, which here appears in the new light of modern philosophy and science, to instruct the sovereign that morality is expedient policy.

The problem ultimately inherent in the pluralistic phenomenology assumed by Coing, is obviated in the critical idealism of Del Vecchio, the leading legal philosopher of Italy, whose influential works contributed to the humanistic revival of natural law in that country early in the present century. Of the two works here noticed, the first, *Justice*, finally makes available in English the text of a lecture inaugurating the academic year 1922–23 at the University of Rome, which has appeared in various editions, both in Italian and in other languages. The introduction and numerous annotations by A. H. Campbell, in addition to the author's comprehensive notes, enhance the value of this edition for Anglo-American readers; it also includes translations of two related articles on penal justice and reparation of damage.

In this classic study, after stating the various aspects of the conception of justice as developed in antiquity—as an attribute of divinity, as universal virtue, and in its particular legal sense developed from the Pythagoreans by Aristotle—the author proceeds to analyze the conception as an a priori attitude or form of thought, namely, that in which the subject contraposits to itself another subject, or in other words a transsubjective consciousness in which the self is coordinated with other selves. The remainder of the lecture is an admirably clear exposition of the logical implications of this principle of inter-subjective coordination, the historical manifestation of justice as thus conceived in systems of civil and penal law, the formal notion and ideal content of justice as natural law, the recognition of the autonomy of human personality within the framework of communal life, and the significance of natural law as a means to reform the "historical precipitate" of positive law. As the author observes, the human mind, like Saturn in the old fable, devours its own children—and this is well, since otherwise there could be no progress.

The second of Del Vecchio's works, listed above in the second French edition, provides both an inventory and a systematic exposé of legal philosophy, defined in the introduction as the *universal* science of law. This includes logical, empirical, and deontological inquiries, concerning law as such, while legal science proper is concerned with particular legal systems. The first part in but 200 pages gives a remarkably coherent and concise historical review of legal philosophy from its Greek origins to the present, with comprehensive references to the more recent literature. The second and systematic part succinctly elaborates the author's "magnificent idealism," so characterized by Ripert in the preface, previously declared in the lecture on *Justice*. Without endeavoring to review this logically integrated and well-known summary of the subject, covering the

concept, historical origins and evolution, and rational basis of law, reference may be made to two points of interest. The first is that the concept of law as inter-subjective co-ordination provides a solution of the relation of law to morals. Both derive from human nature, from the evaluation of human activity by reference to ethical ideas; morals impose on the individual a choice between his possible acts, law a criterion to determine his relations with other individuals. Law therefore implies claims and duties and, unlike morals, is coercible. In the second place, society is a natural fact, necessitated by the human need of association, one form of which is the state. Through the state, a multitude of individuals are enabled to act as an autonomous entity, which is the subject of the legal order, the sovereign expression of the will of the people, or in other words the ideal point at which the principles and determinations embodied in a legal system must converge. This formulation of the traditional conception of sovereignty, regarding law as consisting of imperatives, predicated upon social evaluations, chiefly expressed and enforced by the state, subject as the "potestative expression" of society only to auto-limitation, at the same time emphasizes the legal basis of authority. It admits the *fasces* into the city but insists that they must be legally and justly used.

In connection with the foregoing works, brief reference should be made to a text previously reviewed in this Journal[8] and recently published in a second, revised edition, Dabin's *Théorie Générale du Droit*. It is of interest to observe in this Neo-Thomist exposition of general legal theory, speaking from Louvain between Germany and France, further evidence of the current European concern with the problem of natural law, the more so as the author's assumptions lead to paradoxes which are not unperceived. Thus, for example, law is defined as the rule (*règle*) of civil society, the state; it is established only by or with the consent of the power qualified to act on behalf of the state, the public authority. This, states Dabin, is a condition, not only of the effectiveness or validity, but of the very existence, of law (p. 27). Law therefore is guaranteed by the state and sanctioned by effective constraint—the possibility (*tendance*) of enforcement is not enough. This is the first paradox: how to explain that laws can be violated and that there can be *leges imperfectae*, constitutional or international rules without such sanction.

Again, in the second part of the work, the acute critique of Geny's distinction between the *donné* and the *construit*, the conditioned and the creative sources of law, concludes that law is entirely created and law-making an art of prudence, controlled only in method, not in content. But there are also moral and economic conditions limiting legislative "prudence"; these are not legal, but prelegal conditions of law (pp. 157–160). This is another paradox.

Further, the "natural legal method," which thus controls legislation, subjects law, as contrasted with morals, to its purpose, the public welfare, which

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[8] Horvath, "Comparative Jurisprudence: Heidelberg and Louvain," 1 Am. Jour. Comp. L. (1952) 150.

is the *raison d'être* and end of the state; this englobes the totality of human values. As these values derive in part from considerations of utility and not solely from moral principles, the public welfare cannot be identified with natural law. But, in the third part, in which the question of natural law is considered in detail, after dismissing the possibility of natural law in a legal sense, it is shown that justice is in effect the specific legal form of natural law and that, as distinguished from commutative and distributive justice, *justice légale*, that owed by individuals to the state, is tantamount to the public welfare, by which it is prescribed. This is the central—and disturbing—paradox in Dabin's doctrine, which, positing law as the relativistic rule of state power, a prudential *Staatsraison*, finds in the end that this, being directed to the public welfare, is natural law.

In France, current legal theory, emphasizing social value and reality, has been surveyed in a recent article in this Journal.[9] The many-sided tradition of French jurisprudence, as there depicted, seems concerned with determining the objective criteria of justice rather than with the problem of natural law as such. This concern has a practical side; as illustrated in two recent publications, it carries a definite interest in changing legal institutions and their significance for jurisprudence.

The first of these, the collection of studies on "The Distinction Between Private and Public Law and Public Enterprise," revives the *Archives de Philosophie du Droit* in a new series, after a lapse of twelve years. In explaining this noteworthy development, the coeditor, Paul Roubier, stressing the mortal danger of "realism," after the "frightful convulsions of two world wars," calls for a renewal of reason and idealism to meet the logical necessities imposed by contemporary social developments. To this end—and also not to alarm the jurists accustomed to other methods, especially in private law—the *Archives* will not too brusquely concentrate on pure theory but prepare the way by presenting studies of systematic and theoretical interest on special topics.

The studies in the present volume, which relate to the French scene (almost exclusively so, with one exception in which a comparative study is made of the legal techniques—contractual, regulative, administrative—of planned economy in England, Russia, and the United States, as well as France), nevertheless are of general interest. The widespread extension of state activities in the sphere of private enterprise engenders a host of problems, in particular as respects traditional conceptions of private and public law. This distinction, as indicated in the valuable historical survey of the pre-Revolutionary French literature in the first study (G. Chevrier), was no more sharply drawn under the *Ancien Régime* than in the Common Law; derived from the Roman law and unsuited to feudal ideas, it was but slowly and superficially admitted in the 17th and 18th centuries. The division between private and public law could

[9] Horvath, "Social Value and Reality in Current French Legal Thought," 1 Am. Jour. Comp. L. (1952) 243.

not bloom into its full modern significance until feudalism was abolished and the principle of the separation of powers became a basic feature of French law. Additional studies, all of considerable interest, deal with the problems involved in conducting public enterprises under the rules of commercial law (R. Houin), the recent organization of state corporations as a means for the economic development of territories in the *Union française* (G. Leduc), the repercussions of nationalization of enterprises upon the classic conceptions of administrative law—*service public, établissement public, regime de la concession* (J. Rivero), as well as the study of planned economy to which reference has been made (R. Maspétiol).

Thereafter, in a part entitled *Chroniques et Variées*, a brief comment on the practical uses of legal philosophy (H. Motulsky), a useful summary of Auguste Comte's legal philosophy (V. Veniamin), an extensive book review section, and a selected list of works published since 1940, are included. In felicitating those responsible on this auspicious, if earthbound, revival of the *Archives*, which started in 1931 with Gény's article outlining a genial program for the development of legal philosophy in France,[10] we may look to future issues not only to counteract realism with idealism but also to contribute a more universal—and indeed perhaps a more comparative—accent to French jurisprudence.

The adjustment of law to social change also engages Savatier's work, now in the second edition, on the economic and social *Metamorphoses* of civil law in France today. Here, in fascinating style, current developments in French private law, occasioned by prolific and to some extent hasty legislative expedients for contemporary social needs, are analyzed with a brush as broad as it is incisive. The accelerated rate of social change, it is premised in the introductory chapter, engenders corresponding precipitation of new legal conceptions to meet new needs. The "virus" of communism and the atom bomb profoundly alter international law; great industrial enterprises shift the center of property law from the land to intangible interests; new techniques of accident compensation and plans of directed economy require reformulation of tort and contract law. The author regards the conservatism and experience of the legal profession as indispensable for the progressive reinterpretation of law in terms of the developing requirements of society.

With this in view, the effects of social change in three major branches of private law are considered: contract, family, and property law. The first, contract, is being swept by state control back to status; free enterprise disintegrates. This basic trend the author attributes to two influences: increased control over natural forces, which can be managed only by new types of arrangements, typically collective, state-controlled, international, and above all scientifically determined by experts; and consequent social inequalities, which inspire collective bargaining and the introduction of various types of

[10] "La Notion de Droit en France," 1 Archives de Philosophie du Droit et de Sociologie Juridique (1931) 9.

controls over rents and prices to even the scales of justice. New uses are made of techniques restricting the sphere of the individual's liberty to contract: contracts are standardized, or regulated, or imposed by law, or as in the case of leases simply extended in time so as to create new forms of urban and agricultural property based on occupation or use. Institutions, more or less permanent, collective, hierarchic, and flexible, appear, which tend under state supervision to be organized in an overall plan. The chief factor limiting this evolution, as envisaged by the author, is that slaves do not produce well; consequently, even in Russia, a space must be reserved for individual freedom, which alone ensures equality, security, and the dignity of man.

In the part devoted to family law, the problems considered are relatively indigenous to France. In view of the special provisions protecting family interests, the author would regard the family as a legal person; the influence of the *Assistance publique* in limiting paternal authority is discussed, as well as the special factors respecting adoption and the revolutionary dangers to the family threatened by the discoveries of a "mad group" (*une pléiade enivrée*) of biological investigators, who seek the very secret of human life.

In the field of property law, aside from chapters on the liability for maintenance of illegitimate and other indigent persons as between the family and agencies of public assistance and the recent reform of agricultural tenancies, which unfortunately discourages efficient management and much needed capital improvements in the "tragic situation" of rural France, the trend is toward socialization—of contracts for services, of liability for risks to which individuals are exposed in modern society—and protection of the "*beati possidentes*," who succeed in securing monopolistic privileges for certain trade and professional groups. In sum, the civil law of France, designed in the *Code Napoléon* to conserve vested property, is becoming "proletarian." But the new wealth of enterprise, professional groups, and labor is subject to two perils: undue capitalization and elimination of business risks. Thus, the enterprise pays tribute to those who do not produce, and the entrepreneur becomes a salaried employee, or in the technical legal sense, one of the proletariat. This analysis, brilliant and concerned, of the impact of modern social trends upon the law, reflects the basically conservative and at the same time liberal tradition of French jurisprudence.

IV

RECASENS SICHES, L. *Vida Humana, Sociedad y Derecho*, 3d edition. Mexico: Editorial Porrua, S. A., 1952. Pp. 620.

LEGAZ LACAMBRA, L. *Filosofía del Derecho*. Barcelona: Bosch, 1953. Pp. 687.

MORINEAU, O. *El Estudio del Derecho*. Prólogo del Dr. Luis Recasens Siches. Mexico: Editorial Porrua, S. A., 1953. Pp. xxvi, 521.

In the foreword to Morineau's *Study of Law*, Recasens observes that there are various paths to legal philosophy—from general philosophy, from legal science, from the practice of law. These are the respective approaches of the

three works listed above, which exemplify the varied and notable contributions to jurisprudence that are being made in Spain and Latin America. With a common background of current phenomenological philosophy, conceiving law as an aspect of human culture, these works confirm the pervasive current interest in the evaluation of positive law. Transcending rationalistic natural law conceptions of the 18th century and the positivistic formalism by which these were superseded in the 19th century, their concern is not merely to refine legal logic but especially to establish an objective criterion of law, by ascertaining the ethical ideals and principles of justice inherent in the situation of human individuals in society.

The first of the books listed, the chief work to date of Recasens Siches, comes to legal philosophy from a general philosophy of life; in the comprehensive survey of contemporary Latin-American legal philosophy which appears above in this issue of the Journal, it is reviewed as "the most important" contribution to jurisprudence within the realm of Hispanic culture.[11] Consequently, it needs here only to be noted that in this treatise Recasens sets law as an "objectivated" part of human society within the frame of Ortega y Gasset's philosophy of life, critically develops the formal nature of law, generally in accord with Kelsen, and presents an original system of axiology, in which law is measured by objective humanistic values. It is to be added that this new edition, of which the previous edition has been published in English in the 20th Century Legal Philosophy Series,[12] is considerably amplified; textual details have been refined, and on many points there are brief additions; the part relating to society (*lo social*) has been redone and enlarged, and the valuable bibliographical materials in the notes have been extensively supplemented.

The second approach to legal philosophy is from legal science, as is illustrated by the comprehensive *Philosophy of Law* by Legaz y Lacambra, rector of the University of Santiago de Compostela. This is a substantial revision of the *Introduction to Legal Science* published by the author in 1943.[13] The work is in two parts, respectively dealing with legal science in its relations to legal philosophy and with the "structure" of law, the latter comprehending the concept or theory of law, the differentiation of law from other systems of norms (morals, social custom, politics), the forms and sources of law, justice and security, the individual and his rights, and legal communities—family, labor, national, international, and the Church. The work provides a scholarly exposition of Neo-Thomist legal philosophy, on certain points corrected in accordance with the views of Suarez, but also reflecting current philosophic conceptions, notably the vitalism of Ortega y Gasset. Comprehensive and critical account is taken of contemporary juristic literature, Protestant as well as Catholic; the survey of the modern tendencies in jurisprudence commencing on page 76 is especially valuable.

[11] Kunz, "Latin-American Philosophy of Law," 3 Am. Jour. Comp. L. (1954) 212 *et seq.*
[12] Latin-American Legal Philosophy (1948). Vol. 3, with an introduction by Josef L. Kunz.
[13] L. Legaz y Lacambra, Introducción a la ciencia del Derecho (1943).

For Legaz, law is a perspective of justice, an order of relations in social life. It is not mere objectivated form, as the analysis of Recasens suggests, nor undifferentiated conduct, as Cossio maintains. Law consists of substantive norms or principles, which find imperfect expression in the normative rules of positive law; the error of positivism is to confuse the norms with the rules. The function of legal philosophy is threefold: to determine the social nature of law, as a form of collective life and liberty; to show how the social character of law involves ethical principles; to systematize the concepts in which the fundamental forms of all possible legal experience are expressed. Thus, jurisprudence embraces not only the questions of being and value as respects law, but also the logic of law, which is the theory of legal science. While Recasens places ethics outside law, for Legaz law is the realization of justice; the ideal is distinct from and yet intimately integrated with legal reality. The work of Legaz is outstanding as a balanced exposition of this classic point of view and its application to particular branches of law, private and public.

The third work listed, Morineau's *Study of Law*, comes to legal philosophy from practice; the author's distinguished career at the bar inspired a philosophic interest in legal theory that in 1947 induced him to accept a professorate in law in Mexico City and has borne fruit in the present work. Less comprehensive in scope and reference than the two preceding works and treating primarily the theory or logic of law, it proceeds with admirable clarity, as it were in lecture, to set forth a most interesting and in various respects original analysis. The seventeen chapters cover legal method, analysis of legal conceptions (fundamental concepts of law, presuppositions of fact, rights and duties, sanction and liberty, property, possession, and "jurisdiction"), inter pretation and integration of law, legal relations.

After an introduction justifying instruction in legal theory, the first chapter considers and rejects psychological-inductive and deductive methods of legal study and concludes that the general scientific method of theoretical integration, viz., of formulating and verifying hypotheses respecting the unknown on the basis of existing knowledge, is applicable also to law. For this subject matter, purely formal, teleological, genetic, or empiric methods of research are inadequate, leaving the phenomenological technique of direct perception to be employed.

The following chapters, applying this technique, show that law is designed, not to describe, but to regulate conduct in accordance with legal values, i.e., the external moral values necessary for social life; this is accomplished by legal norms. These are obligatory, as implementing legal values; defined in terms of the factual presuppositions to which they apply; bilateral and external, including at once permission and prohibition of manifest acts affecting others; exigible and coercible, implying assertable claims that, typically but not necessarily, will be sanctioned by the state. The last point is of special interest; it is a fundamental rejection of Kelsen's doctrine that the obligation of law derives from the sanction, on the grounds that this doctrine projects

legal theory in a vacuum, without defining the subject matter, and that a system imposing duties and sanctions for no further purpose is inspired by "juridical sadism." This analysis distinguishes law from morals and social conventions, and its elaboration with respect to rights, duties, legal personality, and legal relations is of exceptional interest. Only a few of the more important logical implications can be noted here.

First, a legal norm imputes rights and duties on the ground of a legal premise, a factual hypothesis that is not only the condition but also the reason of the consequences prescribed by law; this relation is based on considerations of value. Second, the right created by a norm is a *facultas exigendi*, a power or authority to assert a claim; if the claim relates to acts of the person entitled, which are to be respected, the right is absolute; if to acts of another, it is relative. Third, each right has a correlative duty; there is no duty without a right. The conception of duty as developed by the author as the result of a penetrating critique of prior theories, is a significant contribution to legal analysis: a duty includes (a) an authority to act, if the right is relative, or not to act, if the right is absolute, (b) a corresponding prohibition not to act or to act, and (c) a prohibition to opt the contrary. Fourth, when a right is coupled with a duty to assert the claim prescribed, it is obligatory; if not, a right includes an option to assert the claim or not, or in other words a right of liberty. Fifth, starting from Kelsen's conception of legal personality as a center to which rights and duties are imputed but with the criticism that this dehumanizes legal personality, explaining only its function, not what a legal person is, the author emphasizes that the legal person is the human individual. The possibility of collective legal personality depends upon the distinction between the attribution of rights and duties and the faculty or authority to exercise them, which occurs in the case of representation. It thus becomes feasible, when this is needed for practical purposes, to ascribe legal personality to a group or to a mass of property, regarded as a center of legal relations, which are however exercised by individual agents. For legal analysis, the foregoing is of obvious interest, as indeed are the other topics covered and especially the brilliant critique of current legal theories presented in this volume.

In brief conclusion, it may be suggested that current legal philosophy is of comparative significance on two special grounds. First, whatever apathy there may be to philosophical speculation about law in areas where reason is submerged in practice, theory is the central channel for the development of legal ideas in Continental Europe and other parts of the world, where the critical problems of the legal order are discussed in theoretical terms. Second, as a survey of recent literature of jurisprudence, such as that outlined above, cannot fail to suggest, there is today a deep and widespread concern that law should be just. The aspiration to restrain arbitrary power, to direct authority to the realization of valid social ends, and to establish the basic rights of individuals,

as expressed in the works above reviewed, not only from Europe but notably also from America, is a basic motive in modern legal thought.

HESSEL E. YNTEMA*

WINTER, W. D. *Marine Insurance: Its Principles and Practice.* New York: McGraw-Hill Book Co., Inc., 1952, 3rd ed. Pp. 551.

Mr. Winter, life-long officer and now chairman of the century-old Atlantic Mutual Insurance Company, presents the third and thoroughly revised edition of his work on marine insurance as practiced in the United States. The first edition sprang hot from the upsurge of American activity in the First World War, being dated only three months after the 1918 Armistice which ended that conflict, and it guided the many newcomers in the market during the Twenties. The second edition, of 1929, was in our hands during the Second War. The third, greatly rewritten and entirely up to the minute, describes the mature American market now rivalling London. Mr. Winter's long and rich experience, cool and conservative judgment, and leading position in the insurance fraternity assure the continued authority of this book for many years to come. Professor Parsons' famous trio of books on shipping are now a century old. Gow wrote over half a century ago. There is no modern American work to rival that of Mr. Winter. And tremendous events in industry and transportation, politics and war, have drawn large numbers of Americans into this fascinating field of activity.

Mr. Winter's book is for Americans. It describes how things are done "here" and "in this country." Passages describing practices elsewhere—mostly in Britain—are plainly labelled. Curiously, there is little to indicate how things are done in Canada, where Montreal and Toronto are important centers and the whole economy is rapidly expanding. Other markets which have been great in modern times—Paris, Scandinavia, Hamburg, Tokyo—are not dealt with except in the historical chapters; they are now reviving, and may be influenced by this book.

It might even be said that this is a New York book, although the index does not mention that city, nor other great centers such as New Orleans, San Francisco, Cleveland, and Chicago. Yet our insurance laws are built on the foundations of state authority, and the statutes of the states are important. New York statutes are mentioned, but not those of other states, even where there are significant differences. The account is therefore directly "comparative" only as respects New York and London. Nevertheless, it merits the most careful attention of the student of comparative law, because marine insurance crosses all boundaries, interstate and international, climatic, watery, dry, and aerial. And New York is, with London, the focal center.

This is not a law book, although the author is LL.B., LL.D., and F.I.I.A. It is not described as a book about the law, but a book on principles and prac-

* Board of Editors.

tices. The text is not built on quotations from judges; few cases are mentioned, not even the most famous ones; and none are cited to the law books. For the case law we must look elsewhere, and in the absence of a modern American textbook on the law of marine insurance the student and teacher must go to the digests, of which nowadays there are three: the six-volume series of five-year digests of the American Maritime Cases, the Corpus Juris Secundum (now somewhat dated), and the recent American Jurisprudence. It would seem that a table of citations could usefully be arranged without disturbing the smooth flow of the text.

A significant chapter is that dealing with Brokers and Managing Agents. "The broker occupies a somewhat anomalous position in the field of agents," says Mr. Winter. "Ordinarily an agent is paid by his principal. With the insurance broker, however, this condition is reversed. He is engaged and acts as the agent of the assured, but is compensated by the underwriter." He offers a service as an expert, a trained expert. "Success will inevitably come to those brokers who make good their promise by caring for their clients in a manner superior to that of their fellows." Brokers who also do underwriting come into a difficult relation, well described at page 118; for the broker-underwriter cannot be completely faithful to the interest of the assured and that of the insurer simultaneously. The high ethical standards of this brokerage fraternity are in fact reflected by the scanty litigation concerning brokerage in marine insurance in the past half century.

In this wealth of topics, it might be useful to develop the matter of the relation of the cargo interest and the carriers. Which came first, the chicken or the egg? And which generated the other, the cargo or the ship! Mr. Winter deals fully both with cargo insurance and with the hull and its train of associated risks. In each account, he emphasizes the duty of the assureds to conduct their affairs and prepare their goods and offer their services on the basis of the uninsured man taking reasonable care of his own interests. He emphasizes the *uninsurable* aspects of their businesses. Severe is his comment on those who would extend the field of insurance beyond the fortuitous risks and into the domain of human carelessness and inherent vice. There are distinctions here, however, which may be brought further to the surface. The manufacturer should indeed bear his own loss when he makes, packs, and ships a product that will not withstand the risks of the transit contemplated to the distant market. The shipowner should bear his own loss when he sends an inadequately equipped vessel to sea, or motor truck on the highway. But there is a third area of loss, when cargoes damage the vehicles that carry them, or the vehicles and their operators damage the cargoes. This poses the question: Do cargoes generate vehicles and vessels? Or do available vehicles generate cargoes? One school of thought,—and it prevails in the courts of the United States, as recently exemplified in the "both-to-blame collision clause" case,[1] conceives of cargo as

[1] The Esso Belgium—U. S. vs. Atlantic Mutual Ins. Co., 1952 AMC 659; 343 U.S. 236 (1952). (See Knauth, Ocean Bills of Lading, 4th ed. 1953, p. 210 for a fuller account.)

"innocent." The parcel is attracted to the ship as a child comes to an attractive nuisance, and if any harm comes to the cargo, the carrier should pay a hundred per cent. This view took root in the 1870's, when American cargoes were at the mercy of British and other foreign-flag carriers operating under broad "negligence" clauses freeing the ship from many if not all possible liabilities, and the American public was also in rebellion against the exploitation of railroad carriers and beginning to overthrow the pro-carrier rules of law laid down in the period before the Civil War under the leadership of the Massachusetts courts and their great Chief Justice Rugg. The new American view that public policy forbids a carrier and its customer from contracting out of the carrier's common law liability for negligence found little favor abroad, save in distant Australia, and remains the unique doctrine of each of our 48 States.

The opposite view is that carriers are summoned into existence by the behest of cargo owners who do not care to furnish their own transportation; thus cargo is the mother of carriers, and far from being innocent in the matter is to be regarded as the creator and bearer of the risks of its creation. Accordingly, our Canadian and British cousins act on the rule and public policy that the carrier need not pay for all the normal accidents and losses of transport; contract clauses excusing carriers from liability are valid and enforced. Between these two views stand two compromise solutions of world-wide importance—the Hague Rules and Carriage of Goods by Sea Acts for water transport and the Warsaw or Air Carriage of Goods legislations for aviation. These divide the cargo transport risks. On the one side, mere care and custody and the duty to use due diligence to make the ship or plane fit before the start of the voyage; and on the other side the voyage risks. This division represents the actual legal boundary or 38th parallel—to use a current metaphor—along which we find the daily struggles between cargo underwriters seeking subrogation reimbursements from negligent carriers to reduce their loss accounts, and carrier underwriters seeking to defend carriers and themselves from repaying, as damages, substantial percentages of the premiums for insuring the goods whose carriage and freight moneys are the only reason for the carriers' existence.

A ship never evoked a cocoanut, a coffee bean, or an ear of corn. But the crops and mines of the world have evoked the services offered by ships. An area without an exportable surplus of commodities does not generate trade nor support its handmaiden, transport insurance. It is therefore reasonable to assert that shipping is begotten by cargo. Consequently cargo is not "innocent" but is a partner in the transport business and the Canadian and British view—shared by Europe—is more realistic. Mr. Winter's discussion of the both-to-blame clause (p. 403) and of the cargo underwriter's subrogation position (pp. 423–430) does not reflect this problem nor indicate the deep cleavage between United States practice and that of Canada and the rest of the trading world. His company took the lead in attacking the both-to-blame collision clause in the courts, which seems to justify the thought that it is of the opinion that

cargo is "innocent," with the correlative idea that the carrier ship is guilty of something.[2]

Mr Winters does not go into the matter of fixing premiums, save to say (p. 211) that a uniform rate is desirable, the difference in risks being balanced out by deductibles, franchises, and other adjustments, and (p. 439) that profit and competition play a great part. It might be suggested that in the United States, the subrogation claims are also a real factor; and if the United States courts should reverse their policy as to the "innocence" of cargo and accept the Canadian and British policy permitting contracts against liability for negligence, the premium structure in the United States might be affected to an important degree. In theory at least the freight rates should fall correspondingly, as the incidence of cargo losses and damages would be shifted from the shoulders of the carriers to those of the cargo underwriters. Considerations such as these will indicate the interest of Mr. Winter's topic from the point of view of international trade and comparative law.

The subject should not be laid aside without mention of a strongly contrasting presentation, namely that of the late Mr. Howard B. Hurd, of Glasgow, entitled: The Law and Practice of Marine Insurance, relating to Collision Damages and other Liabilities to Third Parties, 2d edition, 1951 (published by Pitman in London). Mr. Hurd, an average adjuster, frequently quotes the exact words of judges to establish his proposition; he cites his cases. But most of all he tackles the matter from the other end, and shows by an ingeniously contrived set of examples, not how the business originates, but how the accounts work out after the accident. Thus one can gain an idea how the numerous types of insurance coverages actually operate and intermesh to afford such cover as is ordinarily available, and what elements are uninsured or uninsurable and fall back on the owner of the property. These examples are exceedingly instructive. While Mr. Hurd has written an English book, its examples and forms are applicable to Continental and American cases and practice. The student of the subject should not omit a careful examination of both of these books, which will show him modern views of marine insurance, seen both from ahead and astern.

ARNOLD W. KNAUTH*

JENNINGS, I.—YOUNG, C. M. *Constitutional Laws of the Commonwealth.* Oxford: Clarendon Press, 1952. Pp. 520.

WIGHT, M. *British Colonial Constitutions, 1947.* Oxford: Clarendon Press, 1952. Pp. 571.

These two books together contain the basic materials on the constitutional

[2] Those interested in the point of view of the carriers and their Protection & Indemnity (P & I) underwriters might consult Mr. Henry I. Bernard's volume on Protection & Indemnity Insurance (2d printing, 1950) published by Johnson & Higgins.

* Member of the New York Bar, Adjunct Associate Professor of Law, New York University.

problems of the "Commonwealth of Nations," formerly known as the British Commonwealth and Empire. While these books overlap in part, they deal in principle with the two different parts of the Commonwealth: the first book places emphasis on the independent members of the Commonwealth, and the second concentrates on the problems facing those parts of the Commonwealth which have not yet attained complete independence.

The book by Jennings[1] is a second edition of a book entitled "Constitutional Laws of the British Empire," which was published in 1938. The change in the title is significant, the Empire having changed into "the Commonwealth" during the interim period. The number of members has also changed in the meantime, as India, Pakistan, and Ceylon joined the United Kingdom, Canada, Australia, New Zealand, and the Union of South Africa. On the other hand, the Republic of Ireland left the group (though it is still not considered as "a foreign country" for the purposes of any law in force in the United Kingdom, and its citizens may in certain circumstances claim to be British subjects), while Burma became an independent country without ever joining the Commonwealth. The members of the Commonwealth (other than the United Kingdom) were known in the past as "Dominions," but Jennings already notes a tendency to abandon this term, and several of the 1952 documents relating to the accession of Queen Elizabeth II speak instead of "Realms." The Royal Proclamation of May 28, 1953 (issued under the Royal Titles Act, 1953, as agreed upon by the members of the Commonwealth) established different Royal titles for each part of the Commonwealth; e.g., the Canadian title is "Elizabeth the Second, by the Grace of God of the United Kingdom, Canada, and Her Other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith." She is no longer "of the British Dominions beyond the Seas Queen," and since 1947 there has been also no "Emperor of India." Recently India has become a republic, but in affirming membership in the Commonwealth of Nations India agreed to recognize the Queen "as the symbol of the free association of its independent member nations and as such the Head of the Commonwealth."

The book by Jennings, though published in 1952, contains the law as it was in 1949, and even some important developments of 1949 are not included. For instance, there is no mention of the British North America (No. 2) Act of December 16, 1949, granting to Canada a limited power of constitutional amendment, nor of the Canadian Supreme Court Act of December 10, 1949, abolishing appeals to the Judicial Committee of the Privy Councils. One may mention also that the case of *Ndlwana* v. *Hofmeyer* facilitating the amendment of the "entrenched sections" of the South African Constitution was reversed in 1952 by the decision in the case of *Harris* v. *Minister of the Interior*.

Jennings has combined in his book an explanatory text with excerpts from almost 60 decisions; in addition, extracts from 14 constitutional instruments

[1] Miss Young died while the first edition was in proof.

are included in the Appendix. The textbook part is written in a clear and precise manner, and those who are familiar with the long opinions of British and Australian courts will admire the skill displayed by the author in condensing them. There are three introductory chapters, and separate chapters on the constitutions of each "Dominion" or "Realm," as well as a chapter on the constitution of the Republic of Ireland. The introductory chapters and those relating to Canada and Australia contain a large number of cases; others contain only a case or two. In the five chapters which contain the bulk of cases, it would have been better if each relevant group of cases had followed the part of the text to which they relate; at present, the reader constantly has to skip and jump. Another difficulty for comparative study is caused by the fact that each constitution is discussed separately, instead of problems common to all constitutions being discussed together regardless of their local origin. While it can be acknowledged that variations in the formulae employed in the several constitutions make comparisons difficult, the author has himself proved in the first three chapters that the comparative method can yield satisfactory results in this field. If the author's aim was, however, to acquaint the reader seriatim with the law of each of the eight countries considered in this book, the selection of materials is not sufficient to achieve that purpose. For six of them the materials included here are too limited in number; for the two federal governments (Australia and Canada), the materials are too limited in depth, and a student of the subject would prefer to use instead the special casebooks by Sawer (Cases on the Constitution of the Commonwealth of Australia, 1948) and Laskin (Canadian Constitutional Cases, 1951). Despite these limitations, the book is well suited for a general comparative course on the constitutional law of the Commonwealth.

The second book contains no cases; it is limited to an excellent introduction of almost 100 pages, the rest of the volume being devoted to the reprinting of constitutions of nine "colonial" territories. The introduction analyzes the constitutions of more than sixty territories. It takes into account not only the thirty-six main units of the Dependent Empire (including Ceylon, which is now independent and is included also in the Jennings volume), but also some thirty minor units connected with the main units by administrative or federal ties. All these constitutions are constantly amended, and it is rather striking that the British Government which functions itself under an unwritten constitution, has through its Colonial Office become the greatest producer of written constitutions in the world.

The thirty-five still dependent units (excluding Ceylon but including in case of multiple dependencies their subordinate units) have a total area of more than 2,000,000 square miles and their population is about 74,000,000. There are two main categories: colonies and protectorates. Colonies are either "settled" or "ceded" or "conquered." The colonies belonging to the first group have for a long time possessed representative governments brought with them from the mother country; the ceded and conquered colonies have only such rights as the

Crown (i.e. the Colonial Office acting on behalf of the Crown) chooses to allow them. The protectorates are not a part of the dominions of the Crown and their inhabitants are not British subjects. Originally, the Crown acquired only the control of foreign relations and defense, but later its powers were vastly extended through a broad interpretation of the Foreign Jurisdiction Acts of 1890 and 1913. While some "protected states" have retained a large amount of control over their internal affairs, most protectorates are administered together with adjacent colonies and their constitutions have become intertwined. There are also several trust territories, over which the United Nations exercises a certain amount of supervision, and three condominiums where the government is shared with foreign powers.

The government of the colonial territories is built on two basic principles of subordination: (1) the legislature is subordinate to the executive; (2) the colonial government is subordinate to the United Kingdom government. In the least developed colonies, all the powers are concentrated in the hands of the governor; at a later stage an advisory council is formed, composed of official and unofficial members, from which an executive council usually develops. In some cases, the governor must consult the executive council before making ordinances, but he is seldom bound by its opinion. The next step usually is the creation of a legislative council. In almost half of the territories that council is dominated by a majority of government officials, thus assuring the dominance of the executive. Even the unofficial minority consists in many cases of persons nominated by the governor, though often upon advice of designated corporate or community groups. Soon, however, the advice of these groups is to some extent replaced by election by them of the unofficial members, thus ensuring for the first time direct representation of the local population in the legislative council. Then the moment is reached when through an increase in the number of unofficial members and a decrease in the number of officials, the unofficial members start controlling the majority of the legislature; this system is called "semi-representative government," in view of the fact that the governor can to some extent control not only the official members but also the nominated-unofficial members. Full representative government comes into being when half or more of the legislative council is elected by the electorate, but even at that stage the council continues to contain a considerable minority of official and nominated-unofficial members. Once the local population succeeds in obtaining a majority in the legislative council, the focus shifts from fight for better representation to struggle between the legislature and the executive. The governor at this stage still retains his reserve powers and can thus either refuse assent to legislation or enact bills over the heads of the majority "in the interests of public order, public faith or other essentials of good government." This causes friction between the executive and the legislature, which in some instances leads to a retrogression and resumption of the legislative power by the governor (e.g. in Cyprus and British Guiana). But in ordinary cases the legislature acquires, after a while, the power to appoint and dismiss members of the

territorial government. If it can control the whole government, the stage of responsible government is reached. But ordinarily this government is semi-responsible only, as the Crown still retains control over a reserved field (e.g. emergency legislation and control of defense and foreign affairs). But the Crown can no longer hide behind the governor, and the subordination of the local to the imperial government becomes more visible, and the conflict from that point on becomes one between the two governments rather than between the local governor and local legislature. The final stage comes when the powers of the Crown, especially the powers to disallow legislation or to enact it in case of emergency, disappear through either constitutional amendment or usage, and the colony is thus ready to join the fully self-governing members of the Commonwealth. The new Central African Federation and the West African territories of the Gold Coast and Nigeria are rapidly approaching this crucial moment.

Wight's introduction guides the reader through these various stages of development and contains a classification of the various territories in accordance with the eight main stages of development. There is also a section on territories with special constitutional structure and a chapter on the nine principal multiple dependencies and the inter-territorial organizations in Africa.

The documentary part of the book contains the full constitutions (Letters Patent, Orders in Council and Royal Instructions) of Palestine (including the mandate), Aden, Nigeria (including the Cameroons, with the mandate and trusteeship agreement), Kenya, Trinidad and Tobago, Malta, Barbados and Ceylon. It includes also the principal British statutes relating to colonies (Colonial Laws Validity Act, British Settlement Acts, Interpretation Act, Foreign Jurisdiction Acts) and excerpts from the Covenant of the League of Nations and the Charter of the United Nations.

The author has made a commendable effort to bring some semblance of order into a chaotic area, but was unable to cope with the tremendous number of changes caused by the rapidity of the general progression of all territories towards a larger measure of self-government. In consequence, though this book was published in 1952, the last texts included date from 1946. The 1946 Constitution of Nigeria was included at the last minute and disrupts the orderly progression from the lower to higher forms of self-government; on the other hand, the 1946 Constitution of Ceylon fits in the right place in the evolutionary order, though it might have been more appropriate to include the constitution of Southern Rhodesia in its place. The introduction deals with changes up to the end of 1950, and the preface deals with developments up to the middle of 1951. More than one third of the constitutions were changed radically during that period, moving two or three points up the scale. Several important changes have also occurred since, in particular in Nigeria, Jamaica, Gambia, British Guiana, and Central Africa.

Perhaps it is impossible to provide up-to-date texts of British colonial constitutions in a single volume, though it might be possible to devise a loose-leaf

edition. The British Foreign Office issued a volume of constitutions of the British Empire in 1938 (as the first volume of a projected but not continued set of "The Constitutions of All Countries"), but no attempt seems to have been made to keep it current. Both the official collection and the one made in the book under review are also too limited in another respect: namely, they reproduce only the ephemeral constitution existing at a particular moment without the prior texts from which it has developed. A comparative study of the constitutions in time as well as in space is necessary, as past constitutions of one country influence not only later constitutions of that country but also the constitutions of other countries. Any attempt to select representative constitutions is extremely difficult, as no two constitutions are identical, and the differences are often more important than the similarities. It may be also argued that atypical constitutions (such as the constitution of Tonga) are often more interesting than those ground out according to a common prescription.

The analytical part of Wight's book suffers from too much concentration on the role played by the legislative council in each territory. There are many other features which merit investigation, e.g. the limitations on electoral qualifications, the role of courts, protection of minorities, financial regulations, etc. The part in which the author classified the various colonies would have been better if he had grouped in each category all the colonies which passed through that particular stage, showing how long they stayed there and which of them moved to the next stage ahead of others, analyzing the reasons for differences in the tempo of development. It is this attempt to fix upon a particular date and to analyze the development of each country at that point, which has caused the author difficulties and has brought the volume so quickly out of date.

While it has been necessary to criticize certain features of these two books, it can easily be admitted that they might serve as an excellent introduction to the problems of the new and ever changing Commonwealth. It may be hoped, however, that in the next editions the gap between the preparation of the manuscript and the final publication will be considerably diminished.

LOUIS B. SOHN*

ADAMOVICH, L. *Handbuch des Österreichischen Verwaltungsrechts*. Vol. 2. Materiellrechtlicher Teil. Fifth edition. Vienna: Springer-Verlag, 1953. Pp. 385.

This book is the second part of Adamovich's work on Austrian administrative law. The first, general, part is expected to follow shortly. The learned author, who is not only a past and present master of Austrian public law, but also *Professor Ordinarius* of Constitutional Law in the University of Vienna and President of the Austrian Constitutional Court, has discharged his task admirably. As far as I can see, every field is covered adequately, and no doubt the present edition will play the same leading role as the standard Austrian work on administrative law as its predecessors.

* Professor of Law and John Harvey Gregory Lecturer on World Organization, Harvard Law School.

The contents of the book are what I have called in my book "Special Administrative Law," i.e., the law pertaining to such matters as are administered by the various administrative agencies of Austria. And it does all this in a space of not quite 400 pages, divided into four parts: Public Law of Persons (birth and death registers, census, education, foundations, registration of persons, and corporations); Public Law of Things (public roads and waters, agrarian reform matters, health, drug, and fire police); Public Law of Enterprises (fish and wildlife, industrial enterprises and mine inspection, liberal professions, hospitals, common carriers, patents and trademarks, cartels and planned economy); and Social Law (collective bargaining supervision, homework, shop councils, social security, public health insurance). Each subchapter is preceded by a list of the pertinent statutes and legal writings. Every conceivable topic is covered fully, that is, in the Continental fashion of outlining the law.

That this can be done in 385 pages proves the vast difference between Continental and Anglo-American law. It is not that their law is simpler—in so old an administrative-legal civilization as Austria special administrative law has inevitably come to be diffuse, rambling, and at times uncertain. But the law just does not go into all the details that we consider law. Rather, they are left to determination anew from instance to instance. (Section 1313a of the 1936 edition of the Austrian Civil Code of 1811 setting forth the respondeat superior rule has 25 cases for annotation!) In this country, on the other hand, I have for some time wanted to put out, in collaboration with many others, a set of volumes dealing with our special administrative law. Various estimates came to the result that to be useful for American lawyers and students such a set, including of course agency regulations and decisions as well as court decisions, would need about 18–20 volumes of about 1000 pages each. In view of the magnitude of this undertaking, no publisher will easily embark on such a project, and so the special part of our American administrative law will not be integrated into books for the time being.

The comparative importance of the administrative law of Austria—rather than of much overrated France—is not so evident from the present volume as it will be from the first one. For Austria must be, and on the Continent has been, regarded as foremost in its contribution to administrative law in that in 1925 it had codified its administrative procedure, including enforcement down to execution, to a degree that we can only hope to imitate at some distant date. The Austrian Administrative Procedure Code is perhaps the finest practical product of Kelsen's School of Law. Whoever wants to study foreign public law should study it, and Adamovich's forthcoming book will no doubt make it easy. But whoever wants to study the actual legal and economic civilization of a foreign country should read the present volume with much profit.

REGINALD PARKER*

* Professor of Law, Willamette University.

HAZARD, J. N. *Law and Social Change in the USSR.* London: Stevens and Sons, Ltd., 1953. Pp. xxiv, 310.

All interested in Soviet law know the name of Professor J. N. Hazard, one of the very few foreigners to have studied in a Russian school of law since the Bolshevik Revolution, and the distinguished editor of the American Slavic and East European Review. Professor Hazard's contribution in recent years to our knowledge of Soviet law has been outstanding, both through his teaching in various universities, and through his writings. These writings, however, previously were in the form of articles, or of introductions or prefaces to translations of Soviet books or materials, while his *Cases and Readings on Soviet Law*, compiled with the collaboration of Morris L. Weisberg, had only been mimeographed.

Law and Social Change in the USSR is therefore the first book published by Professor J. N. Hazard on Soviet law, condensing the author's experiences, readings, and reflections on an important topic, which is of interest for all comparative lawyers and political scientists.

Professor Hazard's book, reproducing a series of conferences given by him at the University of Cambridge, summarizes all that he had written previously in his articles. It is divided into eleven chapters, dealing respectively with the law of property, (including the law of succession), planification and contracts, constitutional law and the status of the communist party, criminal law, the supervision of the civil servants' conduct, *kolkhoz* and cooperatives, labor law, copyright and patents, social insurance and the law of torts, family law, and, finally, the Soviet conception of international public law.

In each topic, Professor Hazard has endeavored to state what the original Marxist doctrine taught and what the Soviet rulers therefore profess their ultimate aims to be. At the same time, he tries to show us how the leaders of the Soviet Union have made the original theory more precise and how they have developed it into something new, Marxism-Leninism-Stalinism, partly for the reason that Marx and Engels have been the authors of a philosophical and economic thesis more than of a legal theory, and partly on account of the fact that they were theoreticians of the 19th century, while the present rulers of Soviet Russia live in the 20th century and are faced with the practical problems of the government of a vast country.

The tenets of Marxism continue still to provide the foundations of the ideology of the Soviet regime, in what may be considered their essence: the Soviet leaders still profess that economic organization is the basic factor in the development of society; everything will in due time be settled in a satisfactory way, according to them, if only the government enforces the basic principles of collectivization of all means of production. Provided that there is no compromise on this essential postulate of the Marxist faith, much can be left to the action of time. Soviet rulers realize that the achievement of communism will require some time. Russia, with its scanty industry and its peasant masses, was ill-prepared to be, among all countries of the world, the

country of socialism, and due account must be taken of the fact that Russia is still surrounded by a hostile world of bourgeois states. Higher production of goods and better conditions of living must be attained before the state can ultimately "wither away," as Marx and Engels predicted; the people must also be educated, and their moral attitude must be changed to that purpose. The struggle against "the remnants of capitalism in the minds of men" must be successful, and possibly the foreign enemies must be made to capitulate before communism can be achieved and perfect freedom granted to the citizens.

The drama of Soviet Russia is in the opposition between a theory, which purports to build a world of freedom and happiness, and present conditions of life, material as well as spiritual, national and international, which impose on the leaders a policy of distrust and the harshest dictatorship over the masses. Soviet rulers believe, or act as if they believed, to have found a formula to ensure happiness and peace in their country and in the world. They are fanatics, who cannot conceive that people might reject their faith and have another ideal; opponents they regard as traitors and spies, lackeys of the capitalists, who deserve only extermination. Soviet rulers are exasperated, on the other hand, by the lack of enthusiasm and the passivity of the masses, who are unable to understand the noble aim of their communist leaders, and prefer to stick to the routine of their traditional ways of life and thoughts. The original Soviet rulers were brought up in Tsarist Russia, and in their minds there was, firmly rooted, the idea that only through revolution could something be achieved in Russia. They have not been able so far to change their minds in this respect,—at least this was true until Stalin's death, after Professor Hazard's book was written,—and they have generalized their Russian preconception and believed that there is nothing but a wish to deceive the workers and to preserve the privileges of the bourgeoisie, in the efforts of the western democracies towards a better and more just organization, through the simple evolution of society.

Professor Hazard's book helps us to realize in the various branches of the law the struggle between the theories of the rulers and the realities of the people and the country. Reference is made to numerous judicial decisions; they reveal a society, which is in many ways similar to that of other European countries and, among other things, rather reluctant to follow the lead of the rulers towards a society of a new type. At times, the rulers are prepared to temporize, and they try to conciliate the people's goodwill; at other times, they become rabid, particularly when they feel that their supremacy is imperilled; then comes a period of terror, to be succeeded, a short time after, by new efforts to conciliate the citizens.

Law and Social Change in the USSR is, through all its chapters, a moving book, where we feel the author's understanding and sympathy for the Russian people, together with his understanding, but lack of sympathy, for the point of view of the Soviet rulers. It will be of great aid for all Westerners in understanding the USSR and provide them with a constructive criticism stressing

the opposition between the ideals and the achievements of the Communist regime in Soviet Russia.

RENÉ DAVID*

Yuridicheskii Slovar. (editorial committee: S. N. Bratus, N. D. Kazantsev, S. F. Kechekyan, F. I. Kozhevnikov, V. F. Kotok, P. I. Kudryavtsev, V. M. Chikvadze). Moscow: State Publishing House for Juridical Literature, 1953. Pp. 781.

Publication of a single volume which may serve as a key to an understanding of a foreign legal system is an event for comparative lawyers. Rarely have Soviet lawyers tried to put their whole legal system between two covers. The current effort takes the form of a "Legal Dictionary," published under the editorship of seven law professors and a committee of fifty authors, many of whom are known for recent books on legal subjects.

Readers of the current work will be reminded of two earlier efforts; that under P. I. Stuchka's editorship in 1929–1930, and that under N. V. Krylenko's editorship in 1935. The first was a three volume work entitled "Encyclopedia of State and Law." The second was a slim two volume work with the manufactured title "*Yurminimum*" or legal minimum required of a lawyer. Both these works have since been removed from Soviet libraries, and the latter has been ridiculed for its title and its oversimplification. Both have been called the work of hostile forces, because they incorporated the work of men who believed in the early withering away of the state and of law.

For the specialist in Soviet law trying to follow events from outside the U.S.S.R., the new work will seem elementary, but it is not without value. It gives an idea of the current Soviet doctrinal position, and it indicates the decrees currently in force in the various fields treated in the articles. This latter information is unusually valuable to Western scholars at the present time, because the official collection of decrees and orders ceased publication in the summer of 1949. Since that time it has not been easy to determine with precision what has happened to specific decrees.

The treatment of subjects varies. Usually the article is short, but "land law" receives four columns, while "inheritance" is given three and a third columns. A sampling of the fare will give westerners some idea of what Soviet authors are telling their readers. Under "Nuremberg Trial" it is stated, "The acquittal of Schacht was not by chance: the USA soon after the trial used him as a consultant in the remilitarization of Western Germany." Further, the article states, "The members of the court from the USA, Great Britain, and France, being the majority, reflecting the view of reactionary circles of capitalist countries and being interested in the preservation of fascism, did not find the S.A. criminally liable." No chance is missed to discredit the non-Soviet world. The article on "absenteeism" tells not of the serious problem before Soviet industrial managers for two decades but of the failure of voters to go

* Professor of Law, University of Paris.

to the polls in capitalist countries. Under "rent," it is stated that there is no regulation of the size of apartments in capitalist countries, but the size is dictated in the lease by the landlord. This approach may calm the Soviet reader who has been held to small quarters for his whole life under the Soviet regime.

The size of the edition is stated to be 75,000 copies, which suggests that it is destined for rather wide distribution. Few will probably be sold abroad, but for those who can obtain them, the book will be a useful research tool.

JOHN N. HAZARD*

BRUSIIN, O. *Über das juristische Denken.* Societas Scientiarum Fennica, Commentationes Humanarum Litterarum, XVII, 5. København: Ejnar Munksgaards Forlag; Helsingfors: Akademische Buchhandlung; Nordische Antikvarische Buchhandlung, 1951. Pp. 164.

This is a fresh and comparative approach to the old problem of the nature of legal thought and the legal mind. Covering a wide range of legal systems and a vast literature, the characterization of the various types of legal activity, constituting the legal profession (pp. 20–44), and of the products (pp. 44–69), constant features (pp. 70–100), and deductive aspects (pp. 100–133) of legal thought, will be found highly illuminating. As in his previous book, *Über die Objektivität der Rechtsprechung*, (Helsinki, 1949, *cf.* p. 122), the author is chiefly concerned with distinctively human characteristics of the legal mind, such as objectivity, the use of universals, and the inevitably ensuing leap from the empirical to the transempirical (p. 12).

Of special interest is the author's attempt, on an anthropological basis, to reconcile the age-old conflict of empirical and transempirical elements in law, as typified in legal positivism and natural law doctrines. Observing the lawyer's daily concern about justice (p. 148) and the ever-recurring, if cryptic, elements of natural law (p. 152), the author tries to reconcile the opposed schools by claiming that it is shortsighted on the part of positivism to attack natural law simply as absurd. In this, he is impressed by the existentialist thesis that man's characteristic is his mental attitude towards death and his faculty to free himself from the fetters of life, as a last resort. The solution of the riddle of ever-recurring meta-empirical elements in law, such as, for example, "guilt" or "just retribution," etc., is to be found in their translation from the metaphysical into the anthropological. By regarding natural law ideas as the concomitants of the anthropological characteristics of man, instead of as objectively existing entities, even the strangest lose their absurdity (p. 153). In other words, they are at once relieved of their excessive claim to truth-value, and recognized as permanent features of the human mind (p. 159). The practical importance of this solution is that, without metaphysical embellishment, man is often unable to confront, and to overcome, the predatory animal in his own nature (p. 158).

The answer to this ingenious attempt is that, though it admirably accounts

* Board of Editors

both for the elusiveness and the indestructible role of natural law elements, hidden even in the very assumptions of legal positivism, and therefore neither demonstrable nor refutable, yet it does not touch the lawyer's proper problems. It appears to be of little use in deciding the truth or falsehood of the propositions which daily absorb the lawyer's attention. In dealing with a legal dispute, he will find little comfort in the statement: "The metaphysical problems may appear absurd from the viewpoint of rational theory; the metaphysical experiences, however, are never absurd" (p. 161). But this anthropological viewpoint serves to conciliate the conflicting schools, clarifying both the limited truth-value and the indestructible core in their opposed doctrines.

Endowed with rare ability to read the legal literature of most of the civilized world in the original languages, extending from the Scandinavian to the Latin (French, Italian, Spanish) and from English to German and Russian, the author is well-informed also on the only slightly less bewildering variety of contemporary schools of thought, legal as well as philosophical, from empiricism to metaphysics, and from existentialism to logical positivism. On this broad background, he tries not so much to settle controversial issues as to give ostensibly irreconcilable doctrines the opportunity to contribute something to the clarification of their common subject of inquiry. This humanistic outlook is appropriate to the rich comparative material and the great variety of legal systems, as well as systems of thought, from which his conclusions are derived.

ILMAR TAMMELO*

* School of Law, The University of Sydney.

Book Notices

GIDE, P.—FROCHOT, L.—NOUEL, P. *Le Projet Français de Loi Anti-Trust et les Expériences Étrangères. États-Unis-Angleterre-Allemagne.* Préface de L. Blum-Picard, Vice Président du Conseil Général des Mines. Paris: Recueil Sirey, 1952. Pp. 56.

"It is obvious that in France, any attempt either to prevent economic concentration, or . . . to fight against the trust as such would be equivalent to economic suicide" (p. 39). This opinion is expressed by a group of French lawyers specializing in international practice, in this short comparative study of the main different systems of antitrust legislation. Yet, starting from this assertion, they come to acknowledge the necessity of adopting some such legislation in France; it is pointed out, however, that such a reform should be promoted in the light of the imperative need of a reasonable type of concentration in many branches of the French economy.

A trend of opinion has regarded nationalization—a remedy of public law—as an efficient answer to this need. Nationalization has had a double purpose: first, the destruction of too large a concentration of private economic power (e.g., in the great banks); secondly, the unification and normalization of one public utility field presently occupied by too many small private organizations (e.g., production and distribution of electric power). As Mr. Blum-Picard observes in his foreword, it cannot be thought that the state has abused this kind of remedy. Criticisms should not be focused upon the principle of nationalization itself, but upon the way in which it has been employed in practice. Another answer to the inevitable commercial and industrial concentration is formulated by the promoters of antitrust legislation; this is a remedy of private law.

The first three chapters provide an analysis of the nature of the problems, different in each country, and a picture of the various remedies adopted in the United States, Germany, and Great Britain; the last part is devoted to a review of the present French economic conditions and an account of the main provisions of the preliminary draft of the statute which has been submitted to the French National Assembly.

Criticisms and suggestions are presented at the end. The authors emphasize the use of the concept of "abuse of right"—familiar to the French doctrine—as the best tool to measure given economic concentration, to analyze its nature, to test its validity according to objective criteria. Moreover, the authors express their preferences to have the jurisdiction in these matters conferred upon the ordinary civil and commercial courts, following the regular procedure, rather than the creation of a special new kind of jurisdiction. It should be mentioned that since that work was published a *décret* dealing with this matter was issued by the French government, on August 9, 1953. Quite brief and imperfect, this text, which recognizes the jurisdiction of the ordinary courts, provides for the creation of a *Commission technique des ententes économiques*, (Art. 59, Quater), viz., an administrative agency appointed to make a report to the competent ministry on the concentration investigated. JEAN GILBERT

LANGEN, E. *Internationale Lizenzverträge.* Weinheim: Verlag Chemie, 1954. Pp. 278.

This book, written in the German language, aims at giving a fairly brief summary of the law of all major countries with respect to the licensing of patents. While it may be helpful to

give a quick survey of the pertinent laws in each country which is covered by the book, it has distinct limitations if it were resorted to for the purpose of seeking reliable practical guidance with regard to the intricate legal problems concerning patent licensing. Thus, the article on the United States includes only a very brief reference to the antitrust laws without giving any indication that, in the preparation of license agreements and their evaluation from a legal point of view, these laws present perhaps the most critical considerations in conjunction with the preparation of any license agreement within the United States and particularly with reference to cross licenses, patent pools, and similar agreements in international trade.

On the other hand, it was apparently the main intention of the editor to compile material which may eventually prove of assistance in any efforts to come to an international understanding in the field of patent licensing. It may well be that as a beginning towards such efforts, Dr. Langen's book may prove of help and value. W. J. D.

KINNANE, C. H. *A First Book on Anglo-American Law.* Indianapolis: The Bobbs-Merrill Company, Inc., 2nd ed., 1952. Pp. xvi, 810.

This is the second edition of the pioneer book published by Professor Kinnane twenty years ago. Although there are now many such introductions to the study of law, this one remains one of the most commendable.

To the new student, Professor Kinnane is not afraid of giving a variety of subject matter. The first part of his book is philosophical and sociological in character, devoted to the nature, origin, and development of law in general. The second and most voluminous part treats of the origin and development of Anglo-American law from an historical point of view. The third is devoted to the organization and jurisdiction of the courts in England and in the United States; and the fourth gives an outline of court procedure and an introduction to legal remedies.

The choice of materials appears sensible. Some notions of philosophy of law may be, if not agreeable, at least useful for the new student. And what he should know before engaging in the study of substantive law is certainly its history, the machinery through which it works, and the way this machinery itself works. The only question is whether some consideration should not have been added on other subjects, if necessary by shortening the two first parts of the book: the constitutional evolution of the country, the present powers of Congress and of the President, and the numerous intricate questions raised by the relationship between the federal and state courts.

The quality of the book may justify the reviewer in a *détournement de pouvoir*, considering the book as a possible introduction to the study of American law for the use of the foreign student or lawyer. From this point of view, the choice of matters becomes necessarily more questionable, but the book remains useful. While the first part of the book loses in interest, the three others retain their value. More crying, however, becomes the need to include other matters: some views on constitutional history, on the organization and powers of Congress, the state legislatures, the presidency and the governors, on the independent regulatory commissions, and on the relationship of the federal and state courts.

Notwithstanding these loopholes—again: mainly from a point of view which is not that of the author—the book appears of high value. Not only does it deal with matters which are fundamental in an introduction to the study of law, but those dealt with are always very well treated, with all desirable clarity and precision.

ANDRÉ TUNC

PETRIE, J. R. *The Taxation of Corporate Income in Canada.* Canada: University of Toronto Press, 1952. Pp. xvii, 380.

PHILLIPS, N. F. *United States Taxation of Foreign Entities.* Toronto: The Carswell Company Ltd., 1952. Pp. xxxv, 379.

The Taxation of Corporate Income in Canada is a study that attempts to analyze the methods of taxing corporate income and dividends and the economic effects thereof in Canada. It was written at the behest of the Canadian Tax Foundation by an economist of first-rank analytical ability. Its underlying theme is that while fiscal policy aimed at curbing inflation is an inescapable element of national policy, such objective faces frustration if it defeats the basic purpose of increasing production to the maximum in order to maintain the position of Canada as a free nation. In perhaps pedantically logical fashion, Mr. Petrie sets forth the several problems he considers; their backgrounds and merits; and his views as derived from an examination of much relevant material. The corporation tax is not a good instrument of fiscal control, he concludes. The heavy taxation of corporations to curb inflation, it is said, may produce an inflationary, rather than a stabilizing result, and may impair incentives and efficiency. Such refinements as deferred depreciation and other gratuitous departures from accepted accounting practice are deemed to have no place in the corporate tax structure.

The book discusses in very comprehensive fashion the background, evolution, rationale, incidence, and effects of the tax: the problems of business losses and the valuation of assets; the integration of corporation and personal taxes; and defense financing. Tables are included to support the author's theses, as is an extensive bibliography with which the serious student of taxation will want to acquaint himself. This is a considered work that will require much application in order that the reader may fully comprehend its implications. It is, on the other hand, a singularly well-organized and systematic study, the understanding of which is greatly facilitated as a consequence. While the author's economics will unquestionably be the subject of much disagreement, there would appear to be little room for argument as regards the manner of presentation and cogency of logic.

Also written by a Canadian is the book, *United States Taxation of Foreign Entities*, dealing, in contrast, with the legal aspects of United States income taxation of non-U.S. citizens who are not residents of the United States, and of corporations not organized under the laws of the United States or its political subdivisions. The applicable law is a crazy quilt of interrelated sections of the Internal Revenue Code; the need for as painstakingly compiled a reference text as this is evident in the light of this fact. Ostensibly for the lawyer without any knowledge of United States tax law, the comprehensive nature of this book will make it valuable, if not indispensable, to American lawyers as well. From time to time one senses an excursion into the irrelevant, as where methods of accounting are discussed, but the informed reader is always free to skip the chapters which do not strike his fancy.

The chapter subdivisions of the book are as follows: "The Framework of the Law;" "Factors Determining the Income to be Taxed;" "Factors Determining When the Income Tax is Due;" "Special Classes of Taxpayers;" and "The Conventions for the Avoidance of Double Taxation and Fiscal Evasion with respect to Taxes on Income." The latter chapter, to which a major portion of the book is devoted, is the one most directly connected with the objective of the book, and is one which will prove invaluable to the international tax lawyer. It should be used in conjunc-

tion with other sources, such as the tax services, however, because of the margin for error that exists where great detail is treated.

A case citation correlator and case list, as well as a treasury ruling list is included, as are several appendices with copies of American tax forms and instructions. There are included excerpts from the reply of the United States Government to the questionnaire on the Tax Treatment of Foreign Nationals, Assets and Transactions, prepared by the United Nations as well. An index speeds the finding process. While the original source materials such as treasury rulings and tax reports will have to be consulted where any sophisticated legal thinking is attempted, the direction in which this work will rapidly orient the answerseeker alone merits it a place in any legal library. The book is up to date to January 1, 1952.

HILLIARD A. GARDINER

ALLEN, C. K. *The Queen's Peace.* London: Stevens & Sons, Ltd., 1953. Pp. xi, 192.

This, the fifth series of Hamlyn Lectures, gives a scholarly and entertaining account of the development of criminal justice in England—the early conception of the royal peace, the establishment in Plantagenet times of the system of criminal law based upon the King's Peace, its byways in later times, the various officers by which the peace was enforced, concluding with a highly informing and practical survey of the multifarious activities of the keepers of the peace in modern England. It is a fascinating story, this, woven from the results of much historical research, describing the fate of numerous legislative experiments and administrative expedients that from time to time have been employed to maintain the peace among a people who, states the author, are basically lawless. H. E. Y.

COLE, G. D. H. *Essays in Social Theory.* London: Macmillan & Co., Ltd., 1950. Pp. vii, 252.

In this volume are collected sixteen essays written by the author from 1941–1948, the first being his Inaugural Lecture on "Scope and Method in Social and Political Theory." This and the three following papers provide a thoughtful discussion of the status of social studies in Great Britain. Other essays deal with the basic conditions of democracy: its essentials, the necessary adjustments in a large community, social morality, individual rights, and the claims of nationality; among these, the papers on Rousseau, the Rights of Man, Auguste Comte, the Communist Manifesto, and the Victorian Ideals are outstanding. The volume concludes with a critical evaluation of the Civil Service and the author's *Credo* as an essentially liberal Socialist. H. E. Y.

DE SOLÁ CAÑIZARES, F. *Tratado de Sociedades Anónimas en el derecho español y en el derecho comparado. Regimen jurídico establecido por la ley de 17 de julio de 1951, con introducciones doctrinales, comentarios al nuevo texto legal y examen de las legislaciones extranjeras.* Barcelona: (Edit. Salvador Rosás Bayer) 1953. Pp. 520.

This work by the director of the new Institute of Comparative Law of Barcelona was previously mentioned in the Spring 1953 issue of this Journal (vol. 2, p. 235; see also the comment on the Law of July 17, 1951, by Phanor J. Eder in the Winter & Spring 1952 issue, vol. 1, pp. 117–8). The work is of special value for comparative purposes, since it not only provides a concise theoretical and practical exposition of the Spanish company law of 1951, but also comparison with the systems in other countries and extensive bibliographical references. The contents, after an introductory chapter, treat the nature of the stock company (*sociedad anónima*), its formation, shares, the

general assembly, modification of the "statutes," the administration, financing, the balance, obligations, transformation and fusion, dissolution and liquidation. The texts of the Law of July 17, 1951, and the supplementary decrees, a detailed bibliography, and a list of the author's publications are included as appendices. H. E. Y.

DORHOUT MEES, T. J. *Kort Begrip van het Nederlands Handelsrecht.* Haarlem: De Erven F. Bohn N.V., 1953. Pp. 664.

This text on the commercial law of the Netherlands is primarily designed for university instruction and as such takes the place of van Molengraaff's *Inleiding*, the later editions of which had been revised by the author of the present and more detailed work. The contents include: a brief introduction, dealing with the history and literature of Netherlands commercial law and the place of custom, acts of commerce, companies and co-operatives, exchanges, markets, and middlemen, commercial paper, insurance, transport—on land, by sea, and on inland waters—commercial sales, including documentary credit, the rights of *reclame* and rescission, bankruptcy and *surséance* (a form of voluntary receivership). As noted by the author, administrative law is but sporadically covered and intellectual property is in general excluded; on the other hand, the problems presented by sale of goods, including the pertinent judicial decisions, are more fully treated than in previous works in commercial law in the Netherlands.

In other topics, only the leading cases are cited. Emphasis is laid on the relations of the civil and commercial law and on the generally accepted views, rather than disputed alternatives; no reference is made to foreign developments. Despite these limitations, the work is a clear and useful summary of the present commercial law of the Netherlands. At the end are included the York-Antwerp Rules 1950, a detailed index, and a list of references to the statutes. H. E. Y.

LEVANTAL, L.—RABINOVITCH, L., avec le concours de GABEN, R. *La réglementation du commerce extérieur et des changes.* Paris: Journal des Notaires et des Avocats, 1953. (Loose-leaf volume) 1050 pp.

Foreign trade is, in its legal aspects, controlled in nearly all parts of the world by government regulations, esp. in the field of foreign exchange control. The new collection of French texts dealing with the various regulations of foreign trade, covers also investments and external assets and contains useful chronological and analytical indices. A doctrine of the international law of financial transactions may later be developed on a comparative basis when such useful compilations as the French one will be followed by similar efforts in other countries. The authors promise, as part of the later issues, an *Étude Générale* of the international aspects and the recognition abroad of the validity of any foreign exchange control. A valuable initial effort has been made in this French publication; its continuation by current (loose-leaf) additions offers a very useful pattern. M. D.

EHMKE, H. *Grenzen der Verfassungsänderung.* Berlin: Duncker & Humblot, 1953. Pp. 144.

This German doctoral dissertation deals with the controversial problem of the limits of constitutional amendments, i.e. the question whether or not certain fundamentals of a constitution, as for instance fundamental civil liberties or basic principles of democratic government, may be altered by the regular amending process. The Weimar Constitution was silent on this question. The means by which Hitler attained dictatorial power appeared lawful under that constitution. The Bonn Constitution now provides explicitly (Article 79) that the federal and

democratic organization of Germany and the basic human rights may not be affected by a constitutional amendment. Any attempt to the contrary would be declared unconstitutional by the Federal Constitutional Court.

The author of the present study considers Article 79 of the Bonn Constitution merely declaratory, not constitutive, except for its reference to federalism. Based mainly on the "doctrine of integration" of Rudolf Smend he is of the opinion that the question of limits of constitutional amendments cannot be answered by interpreting specific articles of the constitution, but only with regard to the constitution as a whole and to the values which are realized in the constitution. He attempts to set up a catalog of fundamentals which underlie the Bonn Constitution and thus are limits of the amending power. He thereby goes considerably beyond the limits which are set in Article 79.

One can appreciate many good ideas in this study. However, it gives a rather incoherent and incomplete picture of the problem. It deals with many questions outside the scope of the subject while the treatment of the subject itself remains fragmentary. The entire first half of the thesis is a history and criticism of general constitutional theory in Germany between 1920 and 1933. It leads to the conclusion that none of the theories of that time except that of Smend can bring a solution of the problem. The second half in which the author states his own views on the subject is a summary account of political principles of a liberal-democratic constitution. It refers mainly to literature of political and sociological nature. One must regret that this thesis does not have any reference to foreign constitutional law or theory except to a few Swiss opinions. A look beyond German constitutional theory would seem almost indispensable for an adequate theoretical treatment of the subject. On the other hand, the study is also incomplete with regard to the German constitutions. It refers to them only incidentally and does not say anything on the practical experiences under the Weimar Constitution or on the actual importance of the problem under the Bonn Constitution.

DIETRICH SCHINDLER

Law and Politics in the World Community. Essays on Hans Kelsen's Pure Theory and Related Problems in International Law. Compiled and edited by George A. Lipsky. Berkeley: University of California Press, 1953. Pp. 373.

GUGGENHEIM, P. *Traité de Droit International Public*, avec mention de la pratique internationale et suisse. Vol. I., Geneva: Librairie de l'Université, Georg & Cie S.A., 1953. Pp. 592.

GUGGENHEIM, P. *Lehrbuch des Völkerrechts*, unter Berücksichtigung der internationalen und schweizerischen Praxis. Vol. II. Basel: Verlag für Recht und Gesellschaft A.G., 1951. Pp. 509–1044.

The seventeen essays collected in the first book are headed by an introductory appraisal of Kelsen's significance, written in a felicitous, easily readable style by the editor. The majority of the essays do not specifically rely on particular tenets of his "pure theory." The galaxy of notable authors contributing finds unity chiefly through preoccupation with the problem stated in the title, borrowed from Quincy Wright's leading essay. Even those solidly rooted in Kelsen's doctrines seem to proceed along lines of their own, occasionally going beyond him: in a sense this is the highest tribute to his scholarship. This is true of Gross' interesting analysis of "autointerpretation," of Verdross' fine inquiry into interactions between the Charter and general international law, and of Lauterpacht's discriminating treatment of "Rules of Warfare in an Unlawful War." Most in line with Kelsen is perhaps the remarkably fine essay on the principle of effectiveness by Tucker. Kunz

treats the new Geneva Conventions with true scholarship which honors his master and friend. The same is true of Hula's essay on human rights which offers a useful comparative analysis of labor and minorities protection. While the contributions of such brilliant authors as Guggenheim, Scelle, Starke, Nussbaum, Brandweiner, Hambro, and Freeman constitute a tribute to the outstanding figure of Kelsen, they are connected in a more remote way either with his doctrine or the central theme of the volume. The latter is attacked more directly by the important American contributions of Eagleton, Morgenthau, and Oliver. There is growing appreciation of the realistic approach emphasizing the interrelation between law and politics on the one hand, but, on the other hand, the replacement of the legal by the political approach is vigorously opposed.

The treatise of the professor at the *Institut Universitaire de Hautes Etudes Internationales* (Geneva) is itself a tribute to the great influence of Kelsen. It follows "pure theory of law" in its major theoretical aspects and happily organizes the vast subject-matter along the system of the personal, territorial, and temporal spheres of validity of international law. However, the material sphere of validity is not treated as systematically. The sources and organs of international law, delinquency, disputes, adjudication, execution, war, and neutrality are dealt with in chapters seemingly outside the system. This is due partly to the difference between statics and dynamics, the spheres of validity belonging in the former. Inevitably, overlappings and duplications occur; within the law of war the material, personal, territorial, and temporal spheres of validity reappear; persons and organs blend; the personal sphere of validity once more reappears with responsibility for delinquency. The chief merit of the treatise is to treat Swiss practice exhaustively: it happily exemplifies what may be called comparative international law.

BARNA HORVATH

KUHN, A. K. *Pathways in International Law*. New York: Macmillan Company, 1953. Pp. 240.

This is the autobiography of the well-known international lawyer and teacher of international law, Arthur K. Kuhn. The author therein relates personal reminiscences of his participation in the practice and in the shaping of international law since the days before World War I, including his efforts in connection with the creation of the League of Nations at the Paris Peace Conference of 1919 and toward adherence of the United States to the League, as well as his support of the idea of the Genocide Convention and of an International Criminal Court. The author's courageous fight to ensure peace and respect for human rights throughout the world is only one aspect of his activities. He has also taken a keen interest in comparative law and is one of the founders of the American Foreign Law Association, which sponsors this Journal as the first United States publication of its kind.

It is impossible to give but this very succinct and incomplete summary of the author's distinguished career, yet it appears sufficient to indicate the scope and importance of his book. As for the views expressed by the author, this reviewer would like to stress their importance by mentioning some of Kuhn's most impressive statements on topics of international law. The author published an excellent book, *Comparative Commentaries on Private International Law*, in 1937. In his present work he justifies his approach to the subject. Like the author, this reviewer believes that practitioners (not only in the United States) will prefer the American method of representing the subject matter, which draws conclusions from actual decisions or legislative provi-

sions, to the European method of developing a system of academic theories on the subject. The author deplores the practice hitherto prevailing in the United States of granting foreign states sovereign immunity, even if engaged in commercial activities —a practice abandoned since this book appeared (*cf.* Bishop, 47 Am. J. of Int. Law (1953) 93–106). As a member of the world-renowned *Institut de Droit International*, the author took an active part in the *Institut's* discussions on the topic of nationalization, a subject which this reviewer has treated in his book *Internationales Konfiskations- und Enteignungsrecht* (*cf.* review in this Journal, Vol. 2 (1953) 547–549). This reviewer is glad to find in the author one more champion of full compensation even in the case of large-scale nationalizations. The author's remark that in certain cases conflicting nationalization laws may claim the same object is highly stimulative. This reviewer is still looking for a decision on such a conflict of laws. None has, however, come to his notice, as most such differences appear to have been settled thus far through diplomatic channels. Moreover, in countries refusing to recognize any extraterritorial effects of foreign nationalizations except upon payment of full compensation to the owner, no such conflict will arise in case the foreign nationalization law claiming the object does not fulfill these conditions.

IGNAZ SEIDL-HOHENVELDERN

BERGER, A. *Encyclopedic Dictionary of Roman Law.* Transactions of the American Philosophical Society. New Series, Vol. 43, Part 2. Philadelphia: The American Philosophical Society, 1953. Pp. 333–808.

Sincere homage is due to the author of this volume, who, "after several decades of study and research" has contributed to legal literature this invaluable piece of work. It is to be hoped that it will find a place on the shelves of every law school and will promote the interests of the "*cupida legum iuventus*" to become acquainted with the intellectual and legal background of a law that formed the basis of the legal system of a large part of the world.

The volume transcends the limits of an encyclopedic dictionary. It offers the entire history of Roman Law. The entries cover the development of Roman legal institutions as well as their substantive legal and procedural characteristics, and are supplemented with source references from the earliest times to Justinian's codifications and, in some instances, with references to Byzantine and medieval collections. A random selection from the wealth of entries gives necessarily an inadequate picture of the thoroughly scientific treatment of the topic; suffice it to mention as examples such institutions as *Senatus* (*Senatusconsulta*) (pp. 695–700), *Actio* (pp. 341–348), *Interdictum* (pp. 507–512), *Missio* (pp. 584–585), and *Lex* (pp. 544–561) which developed predominantly along procedural lines, and *Ius* (pp. 525–534), *Dominium* (pp. 441–442), *Obligatio* (pp. 603–605), and *Servitus*, which incorporated substantive legal rights. In addition to the encyclopedic part of the book, there is an English-Latin glossary for readers who are less familiar with Roman legal terminology, and an exhaustive bibliography, which, arranged analytically, refers to the various branches of Roman law, to the history of Roman law, including chapters on the legislative activity and legal policy of the emperors, on Christianity and Roman law, on Roman law and the modern legal systems, and on Roman law and the Anglo-American world. It concludes with a survey of collections of source material for teaching purposes, of collective works, encyclopedias, dictionaries, and bibliographies.

V. B.

Das Dänische Strafgesetzbuch. Translated into German by Franz Marcus. Berlin: Walter de Gruyter & Co., 1953. Pp. 75.

In the series of translations of foreign Criminal Codes into German this translation of the Danish Criminal Code was recently published. The translator is a former German judge, now a resident of Denmark. A spot-checking shows the translation to be very reliable. The initiative of making translations of statutes and codes available in one of the world-languages from the less well-known languages is very much to be welcomed. It makes it possible for comparative lawyers to go directly to the source instead of relying on more or less exact reports. This translation may also be of practical importance when the NATO jurisdictional system comes into force, that places the members of the American armed forces in Europe under the jurisdiction of the local courts and laws.

The translation reproduces the Danish Criminal Code of April 15, 1930, with the changes that have occurred since. Although very modern when adopted, quite a few reforms have been made during the last 24 years, and new reforms are soon to be expected. These frequent reforms in society's reactions to crime make the Danish criminal law a most interesting laboratory for the criminologists. The present translation makes it possible for a greater audience to take part in the results of these experiments.

If one may suggest another criminal code for translation I would recommend the new Criminal Code for Greenland which is soon to be passed by the Danish parliament.

ALLAN PHILIP

PRICE, M. O. *A Practical Manual of Standard Legal Citations.* (Second Printing.) New York: Oceana Publications. 1950. Pp. vi, 106.

The usefulness of this short style manual is attested by the fact that a second printing, revised in detail, has been made within a year. Here are to be found concise instructions how the various types of legal materials should be cited—statutes, regulations, cases, service publications, treatises, reports of cases, periodicals, etc.—supplemented by sections relating to page citations, quotations, indexes, capitalization, abbreviations, and typography. Most helpful are the frequent examples, indicating preferences and possible variants. The legal sources covered primarily are those of the United States; secondarily, the English; Scotch, Irish, Canadian, Australian, etc., materials are not included. There is a page on foreign law, valuable as far as it goes but naturally inadequate for any substantial use of foreign sources. For these, a similar work is a *desideratum* devoutly to be wished.

The *conoscenti* in this indispensable, if formal, aspect of legal research will note various points that might be argued; these, for the most part, the author resolves in a common sense way. As an exception, the undersigned, who a number of years ago supervised the Codification Board that produced the first edition of the Code of Federal Regulations, should perhaps note that, although a particular form of citing this publication was officially adopted by the Board and later used to ensure simplicity and uniformity in citations thereto (e.g., 4 CFR 10.1), the author indulges a personal preference to recommend something else (pp. 13, 92). While the work is not on the level of the standard stylebooks, especially those published by the Government Printing Office and the University of Chicago Press, which represent much revision by many hands, it is a valuable supplement, particularly practical for lawyers and others who have to use the legal sources of the United States.

H. E. Y.

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Mention in this list does not preclude a later review

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Bulletin

Special Editor: KURT H. NADELMANN
American Foreign Law Association

REPORTS

COLUMBIA BICENTENNIAL CONFERENCE—The American Foreign Law Association joined with the Association of the Bar of the City of New York, the Fund for the Republic, Inc., and Columbia University in presenting a *comparative law conference* in honor of the bicentennial of Columbia University. For two days on January 15 and 16, 1954, twenty-one delegates from various parts of the world considered the restrictions upon man's right to knowledge which have become necessary in the interests of national security.

To provide perspective, the 3,000 years of experience of Judaism with dissent and its control was reviewed by Rabbi Robert Gordis, former President of the Synagogue Council of America. Following him there appeared the Very Reverend Dr. Francis J. Connell, C.SS.R., explaining the Index of the Roman Catholic Church. The third speaker on the panel discussing the experience of religious communities was H. E. Dr. Saba Habachy, observer of the Arab League to the Economic and Social Council of the United Nations, who discussed the experience of Islam; and the final speaker on the experience of Protestantism was the Reverend Robert T. Handy of Union Theological Seminary.

The more recent experience of the nation states was presented by Jesus de Galindez, Esq., speaking of Spain, Prof. Harold J. Berman speaking of the U.S.S.R., Dr. Hu Shih, speaking of the Republic of China, Prof. Isaak Kisch, speaking of the Netherlands, the Rt. Hon. Sir Hartley Shawcross, speaking of the United Kingdom, Dr. Jacques Bourquin, speaking of Switzerland, Prof. André Mathiot, speaking of France, Prof. Angelo Piero Sereni, speaking of Italy, and the Hon. Ivan C. Rand of the Supreme Court of Canada.

The conference was opened by Dean William C. Warren of the Columbiaw La School reviewing the American law of criminal libel. Following the presentation of papers, a panel of experts attempted to draw conclusions. The experts were Dr. Arthur L. Goodhart, Master of University College, Oxford, Prof. F. H. Lawson, of Oxford, Dr. Boris Mirkine-Guetzévitch, Dean of the Faculty of Law of the French University of New York, Whitney North Seymour, Chairman of the American Bar Association's Committee on individual rights as affected by national security, and Clifford P. Case, President of the Fund for the Republic and former Congressman. The President of the Association of the Bar of the City of New York, Bethuel M. Webster, presided throughout the conference.

The papers presented and a brief summary of the conclusions of the panel of experts will appear in a special bicentennial issue of the Columbia Law Review. JOHN N. HAZARD

THE FIRST REPORT OF THE LORD CHANCELLOR'S COMMITTEE ON PRIVATE INTERNATIONAL LAW—Great Britain has had since 1952 a Standing Committee on Private International Law, appointed by the Lord Chancellor. One of the assignments received by the Committee is consideration of "what amendments are desirable in the law relating to domicile, in view especially of the decisions in Winans v. Attorney General, [1904] A. C. 287, and Ramsay v. Liverpool Royal Infirmary, [1930] A. C. 588, and whether, in the light of any alterations which the Committee may recommend in that law, it appears desirable that Her Majesty's Government should become a party to the draft Convention to regulate conflicts between the law of nationality and the law of the domicile"

[that is, the draft Convention adopted on this subject at the 1951 session of the Hague Conference on Private International Law, 1 American Journal of Comparative Law 280 (1952)].

The "First Report" of the Private International Law Committee has now been presented to Parliament by the Lord Chancellor. The Committee, composed of Justice Wynn Parry, chairman, J. G. Beevor, Professor G. C. Cheshire, A. G. N. Cross, D. W. Dobson, W. A. H. Druitt, G. G. Fitzmaurice, A. L. Innes, Dr. F. A. Mann, R. W. A. Speed, R. O. Wilberforce, Professor B. A. Wortley, members, recommends in the report (1) definition of "domicile" by statute, and (2) ratification of the Hague draft Convention, except for its provision defining domicile as habitual residence. The proposed statutory definition of "domicile" is enclosed in a draft "Code of the Law of Domicile" consisting of five Articles. The Code would abolish the doctrine of revival of the domicile of origin and would give rebuttable presumptions for proof of intention to change a domicile, thus bringing the statutory definition of domicile close to that of the draft Convention. Under the Code, the domicile of a married woman would be that of her husband, except that a married woman who has been separated from her husband by the order of a court of competent jurisdiction would be treated as a single woman.

The report has been published as Command Paper No. 9068 (February, 1954). K. H. N.

ASSOCIATION OF AMERICAN LAW SCHOOLS, COMMITTEE ON COMPARATIVE LAW—The Committee on Comparative Law of the Association of American Law Schools arranged for a round table discussion on "Comparative Civil Procedure" at the 1953 Annual Meeting of the Association. Papers were presented by Professor Eugen Ulmer, of the University of Heidelberg ("Some Basic Differences between Civil and Common Law Civil Procedure"), Professor Arthur Lenhoff, of the University of Buffalo ("The Law of Evidence in Civil and Common Law Systems"), and Professor Leon D. Hubert, Jr., of Tulane University ("The Use of Comparative Research in Procedural Reform in the United States"). Professor Arthur von Mehren of Harvard University presided.

AMERICAN FOREIGN LAW ASSOCIATION—At the annual meeting of the Association on March 24, 1954, the following members of the General Council, Class of 1957, were elected: Arthur K. Kuhn, Max Rheinstein, Angelo Piero Sereni, Harold Smith. Kurt H. Nadelmann was elected a member of the Class of 1955 (vacancy created by the election of John N. Hazard as Vice-President). At the meeting of the General Council the following officers were elected or re-elected: President: Otto C. Sommerich; Vice-Presidents: Alexis C. Coudert, John N. Hazard, Hessel E. Yntema; Treasurer: Robert R. Boot; Secretary: Albert M. Herrmann, One Wall Street, New York 5, N. Y.

ANNOUNCEMENTS

HAGUE ACADEMY OF INTERNATIONAL LAW—The 1954 session of the Hague Academy of International Law will run from July 19 to August 14, 1954. The lectures will be in the fields of: History of International Law; Principles of Public International Law; Private International Law; Public Administration; International Organizations. The program may be obtained from the Secretariat, Peace Palace, The Hague.

FIFTH INTERNATIONAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION, Monaco, July 19th to 24th, 1954—The fifth conference of the Association will be held in Monaco from July 19 to 24, 1954. The topics on the agenda for discussion in committees are: the constitutional structure of the United Nations in the light of the proposed amendatory conference of 1955; a code of ethics for lawyers; economic warfare,

particularly the aspect relating to the restitution of private property which has been vested or blocked; extraterritorial effects of divorces and separations; international aspects of nationalization; taking evidence abroad by way of documents or testimony; and experience with treaties to avoid double taxation. The office of the Secretary General is 501 Fifth Avenue, New York 17, N. Y.

FOURTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW, Paris, August 1st to August 7th, 1954—The 4th Congress of the International Academy of Comparative Law will be held at the Faculté de Droit in Paris from August 1 to 7, 1954. For the program, see page 137 of volume 2 of this Journal. Professor John N. Hazard, 20 E. 94th Street, New York 28, N. Y., is secretary of the national committee for the United States.

INTERNATIONAL LAW ASSOCIATION CONFERENCE, Edinburgh, August 8th to 14th, 1954—The 46th Conference of the Association will be held in Edinburgh, August 8 to 14, 1954. The program includes the following topics: International Law and International Trade; Review of the United Nations Charter; International Monetary Law; International Company Law; Air Law; Inland Water Rights; Insolvency; Family Relations; Rights to the Sea-bed and its subsoil. Further information may be obtained from the Hon. Secretary of the American Branch, John J. Abberley, 55 Liberty Street, New York 5, N. Y.

VARIA

FIRST CUMULATION OF THE "INTERNATIONAL LAW AND RELATIONS, COMPARATIVE AND FOREIGN LAW" PART OF THE INTERIM SUPPLEMENT TO THE INDEX TO LEGAL PERIODICALS—The Index to Legal Periodicals, published by the American Association of Law Libraries, does not, as is well known, cover periodicals published in foreign languages, with the exception of some journals appearing in Puerto Rico and the Province of Quebec. To meet the needs of the American lawyer working in public international law, conflict of laws, and comparative law, the *Interim Supplement* to the Index, produced since September 1952 by the staffs of the Law Libraries of Columbia University and New York University and issued every three weeks, has indexed in a Part II articles from a selected number of legal periodicals, in the English or a foreign language, in the fields of public and private international and comparative and foreign law. To this Part II of the *Interim Supplement*, covering some hundred and twenty journals, there has been brought out, mimeographed, a First Cumulation, September 1952 to August 1953. Distributor of Interim Supplement and First Cumulation: Fred B. Rothman & Co., 200 Canal Street, New York 13, N. Y. K. H. N.

IN MEMORIAM

MARTIN WOLFF—It is not given to many lawyers to start a new career after reaching the age of sixty-five; but this must be added to the other accomplishments of Martin Wolff. Married to the sister of Professor H. F. Jolowicz, he was able to transplant himself to England in 1938. A few months earlier, on a visit to Oxford, he had delivered a remarkably informative and lucid, and one might say conclusive, lecture "On the Nature of Legal Persons," which found its way into the Law Quarterly Review and has since been prescribed reading for all students of the subject. All Souls College invited him to settle in Oxford and assisted him financially in preparing a book on English Private International Law.

That book appeared in 1945 (2nd ed. 1950), and rapidly became one of the most important books on the subject. It was to be expected that the author would introduce a comparative element into a part of the law which, though English in the strict sense of the term, has always been receptive of foreign influences, and that he would use foreign experience to suggest the solution of questions that had not hitherto come before the courts. It was a matter for surprise that he should have shown so complete a familiarity with the English point of view and that reviewers, whilst pointing to a very small number of solecisms, should have disagreed with him as though he were one of themselves and not an intruder from abroad.

Wolff also contributed a long account of French Private Law to the new edition of Chambers' Encyclopaedia and a brilliant summary of Commercial Law to the Manual of German Law published by Her Majesty's Stationery Office for the Foreign Office.

Although he came into official relations with the Oxford Law Faculty only on rare occasions, as supervisor or as examiner of a thesis, he was able to play a slight but valuable part in teaching; and for this I must take some credit, for I induced him to add his presence to informal instructions and seminars on comparative law. This started before the war and continued during the first two or three years following. After the war Mr. C. H. S. Fifoot and I started to hold regular classes in which we compared the Roman and English law on certain topics, such as Sale, Negligence, and the Ownership and Possession of Movables, and we regularly introduced some of the law of Continental Europe. Martin Wolff was almost always present and usually contrived to intervene with a problem, sometimes of a ludicrous but always of a significant character, so as to open up the subject beyond anything that his undergraduate hearers could have anticipated; and of course he gave them an insight into German law at points where it differed, in a perfectly rational way, from both Roman and English law. He enjoyed these opportunities of meeting young men until his health began to fail seriously during the last year or two of his life. Certainly quite a fair proportion of the ablest young Oxford lawyers came to learn his extraordinary powers as a teacher; and they were not the only members of the class to learn from him.

He took longer to become known to the Oxford Law Faculty, mainly because he came to Oxford at an unpropitious moment, and after the war the pressure of increased numbers left few with any leisure to go outside their regular work; but partly also because of his great modesty, his disinclination to put himself forward, and the fact that he did not dine out very willingly. But in the end he was perfectly well known, and some of us became deeply attached to him. When he reached the age of eighty, the University conferred on him the honorary degree of Doctor of Civil Law, which is very rarely conferred on anyone who professes to be an academic lawyer. He passed into the company of Holmes, Maitland, Riccobono, and Buckland.

As one who saw much of him in his later years, I may perhaps be permitted to call attention to his remarkably sweet and gentle disposition, to which he united a sharp and pungent wit and a clear insight into his own and other people's abilities and character. These qualities, together with a wide range of interests, of which perhaps the most vital was in the theory and practice of music, made him excellent company. He will be greatly missed by a small but devoted circle of friends in England and by a whole generation of lawyers abroad.

F. H. LAWSON